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REPORTS

OF

CASES

ADJUDGED IN THE

DISTRICT COURT

FOR THE

CITY AND COUNTY OF PHILADELPHIA,

AND THE

COURTS OF COMMON PLEAS

OF

PENNSYLVANIA.

BY PETER A. BROWNE.

PHILADELPHIA:

PRINTED BY JOHN BENNS.

1813



KFP
52
P48
B15

District of Pennsylvania, to wit:

.....
[SEAL]
.....
BE IT REMEMBERED, That on the sixteenth day of July in the thirty-eighth year of the independence of the United States of America, A. D. 1818, Peter A. Browne, of the said district, hath deposited in this office the title of a book the right whereof he claims as author in the words following, to wit:

"Reports of Cases adjudged in the District Court for the City and County of Philadelphia, and the Courts of Common Pleas, of Pennsylvania. By Peter A. Browne."

In conformity to the act of congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned." And also to the act, entitled "An act supplementary to an act entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

D. CALDWELL,
Clerk of the District of Pennsylvania.

**TO THE HONORABLE
WALTER FRANKLIN, ESQUIRE,**

President of the Courts of Common Pleas of the Second Judicial District of Pennsylvania.

**This volume of Reports of Cases is with the
utmost respect and esteem, inscribed by**

His friend and

Obedient servant,

PETER A. BROWNE.

DISTRICT COURT,

FOR THE CITY AND COUNTY OF PHILADELPHIA.

President, The Honorable Joseph Hemphill, Esquire,

***Assistant Judges, The Honorable Anthony Simmons, and
The Honorable Jacob Sommer, Esquires.***

Presidents of the Courts of Common Pleas of Pennsylvania.

1st Dist. President, The Honorable Jacob Rush, Esq.		
2d do.	do.	The Honorable Walter Franklin, Esq.
3d do.	do.	The Honorable Robert Porter, Esq.
4th do.	do.	The Honorable J. Walker, Esq.
5th do.	do.	The Honorable Samuel Roberts, Esq.
6th do.	do.	The Honorable J. Moore, Esq.
7th do.	do.	The Honorable Bird Wilson, Esq.
8th do.	do.	The Honorable Seth Chapman, Esq.
9th do.	do.	The Honorable J. Hamilton, Esq.
10th do.	do.	The Honorable J. Young Esq.
11th do.	do.	The Honorable John B. Gibson, Esq.

CASES

IN THE

District Court,

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

1810.

THE Honourable the Legislature of the Commonwealth of Pennsylvania, at a Session begun and held on the first Tuesday of December, 1810, passed the following Act, entitled

“AN ACT to provide for the erection of an additional Court within the City and County of Philadelphia.”

“WHEREAS the Court of Common Pleas of the City and County of Philadelphia, from the various objects of its jurisdiction, and the great increase and accumulation of business, is incompetent to the speedy and effectual administration of justice to the citizens of that district. For remedy whereof—

SECT. 1. Be it enacted by the Senate and house of Representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same,—That there shall be a court of record established in and for the city and county of Philadelphia, by the name and style of “The District Court for the City and County of Philadelphia,” which shall consist of a president and two assistant judges, any two of whom, in case of the absence or inability of the other, shall have power to try, hear and de-

1810. **termine all civil pleas and actions, real, personal, and mixed; and for the trial of all such pleas and actions, shall have and exercise the same powers, authorities and jurisdiction as are now vested by law in the Court of Common Pleas for the City and County of Philadelphia; Provided, that the said court shall have no jurisdiction either originally or on appeal, except where the sum in controversy shall exceed one hundred dollars.**

SECT. 2. *And be it further enacted by the authority aforesaid,—*That from and after the first Monday of June next, all suits and causes depending in the Court of Common Pleas of the City and County of Philadelphia, where the sum in controversy exceeds one hundred dollars, shall be transferred to the said district court, there to be heard, tried and determined, and the original jurisdiction of the said Court of Common Pleas of the City and County of Philadelphia, in all civil actions where the sum in controversy exceeds one hundred dollars, shall thenceforth cease and determine.

SECT. 3. *And be it further enacted by the authority aforesaid,—*That no suit shall be removed from the District Court by *certiorari* or *habeas corpus*, but that in all cases the final judgment of the said District Court may be examined and affirmed, or reversed on a writ of error from the Supreme Court in a similar manner, and subject to the same limitations and provisions under which writs of error are now issued from the Supreme Court to the Court of Common Pleas of the City and County of Philadelphia.

SECT. 4. *And be it further enacted by the authority aforesaid,—*That the said District Court shall hold four terms in the course of each year, one to begin on the first Monday of June, the second on the first Monday of September, the third on the first Monday of December, and the fourth on the first Monday of March respectively; and shall have full power, and are hereby enjoined to, hold adjourned courts whenever the state of the business shall require it, and also make such regulations of practice as may most facilitate the progress of justice; *Provided always, that if the number of suits before the said court should render it necessary, the judges of the said court shall sit daily (Sundays only excepted), during at least*

nine months in every year: *And provided also*, that the determination of no cause or action before the said court shall be delayed beyond the fourth term, including that to which the said action was instituted, if the parties be prepared for trial at the times appointed by the said court; and if the judges of the said court, should wilfully delay any cause, suit, or action, in readiness for trial as aforesaid, it shall constitute a misdemeanor in office.

1810.

SECT. 5. *And be it further enacted by the authority aforesaid*,—That the President of the said District Court shall receive a yearly compensation of two thousand dollars, and the assistant judges, shall each receive the sum of five hundred dollars, payable quarterly, out of any unappropriated money in the treasury.

SECT. 6. *And be it further enacted by the authority aforesaid*,—That the prothonotary, for the time being, of the Court of Common Pleas of the City and County of Philadelphia, shall perform all the duties of the prothonotary of the said District Court, and the sheriff and coroner, for the time being, of the City and County of Philadelphia, shall obey all lawful orders of the said District Court; and all the costs and fees now established by law in the Courts of Common Pleas shall be charged and payable in similar instances in the District Court.

SECT. 7. *And be it further enacted by the authority aforesaid*,—That the said court shall be opened for the purpose of issuing mesne process on the first Monday of May next, which shall be for that purpose a *tente day* of all process relative to the first term: on or before which day the judges of the said court shall be appointed.

SECT. 8. *And be it further enacted by the authority aforesaid*,—That the names of jurors to serve at the said court shall be drawn from the wheels, provided for special and general jurors in the County of Philadelphia, agreeably to the directions of an act, entitled, “An Act directing the mode of selecting and returning jurors,” passed the twenty-ninth of March, one thousand eight hundred and five, and the sheriff and commissioners of the said county shall forthwith, after the passing of this act, put into said wheel the names of a com-

CASES IN THE

1810. ~~petent~~ number of jurors to serve at said District Court for the remainder of the present year, and shall annually afterwards, at the time appointed by law for putting into the said wheel, the names of the general and special jurors for the said county, add a competent number to serve at the said District Court, agreeably to the provisions of the law in such case made and provided.

SECT. 9. *And be it further enacted by the authority aforesaid,—That this act shall be and continue in force for the term of six years and no longer.*

JOHN WEBER,
Speaker of the House of Representatives.

P. C. LANE,
Speaker of the Senate.

APPROVED—The thirtieth day of March, one thousand eight hundred and eleven,

SIMON SNYDER.

1811. **IN** pursuance of the seventh section of the foregoing law, **the DISTRICT COURT FOR THE CITY AND COUNTY OF PHILADELPHIA,** was opened: Present the honourable **JOSEPH HEMPHILL,** *President,* and the honourable **ANTHONY SIMMONS,** *Assistant Judge.*

May 6.

Their commissions were severally read by the prothonotary.

ORDERED BY THE COURT.

That until this Court direct otherwise, the rules of the Court of Common Pleas of the first Judicial District shall regulate the practice.

1811.

June 3.

JUNE TERM, 1811.

THE honourable JACOB SOMMER, *Assistant Judge*, took his seat on the bench, and his commission was read.

The principal part of the morning was consumed in the admission of attornies.

McKean first applied for his own admission, and being sworn and admitted, moved for the admission of some other gentlemen of the bar, which motion was received, and, upon subsequent motions, the attornies of the Court of Common Pleas of Philadelphia County, were sworn or affirmed, and admitted.

RANKIN, administrator, &c. *versus* COOPER.

June 4.

THIS was an action of *indebitatus assumpsit*, brought on a note of hand drawn by the defendant in favor of the plaintiff's intestate, for four hundred and sixty-six dollars.

The defendant had entered the pleas of "*non assumpsit*, payment and a release." The plaintiff had been put to no trouble or inconvenience to procure evidence to prove the *assumpsit*.

When the jury was called into the box to be sworn, *Hal- lowell*, for the defendant, moved to strike out the plea of *non assumpsit*.

In support of the motion, he referred to the case of *Vuyton* against *Briculle*, (a) in which the Circuit Court of the United States decided, that where the pleas were *non assumpsit* and payment, the defendant might, of course, strike

Where the pleas were *non assumpsit* and payment, and a release, and the plaintiff had not been put to any trouble to prove the *assumpsit*, the court allowed the plea of *non assumpsit* to be struck out after the jury were called in to the box to be sworn.

The deposition of a witness, who was not within the jurisdiction of the court, was read although

(a) 4 Dallas's Reports 205, Note 25.

no subpoena had been taken out. A paper under seal, purporting to be a release executed by attorney, was rejected, because it did not appear, that the attorney was authorized by deed, to execute a release.

1811. out the plea of *non assumpsit* without applying to the court, at any time before the jury was actually sworn.

RANKIN
administrator,
&c.
against
COOPER.

Phillips, contra, objected to the motion and cited the case of *Jackson et al.* against *Winchester*,^(a) in which the Supreme Court had refused a similar motion. Between these two conflicting authorities, he said, the court would have but little difficulty in deciding; as, he presumed, they would prefer that of the judges of the Supreme Court, for a very obvious reason, viz. that *they* had the power to review the record and proceedings in this case.

Hallowell replied, that there had been no difference of opinion between the two courts; the Circuit Court of the United States had laid down the *general rule*; the case presented to the Supreme Court, formed an *exception*, as was evident from the reports of the cases.

The court concurred in the distinction made by the counsel for the defendant, and, as the plaintiff in this case had not been put to any trouble or inconvenience in procuring testimony to prove the *assumpsit*, they allowed the plea of *non assumpsit* to be struck out.

The jury were then sworn, and the cause proceeded. *Hallowell* offered in evidence the deposition of Washington Perkins, taken under a rule of court. The witness was not within the jurisdiction of the court, and *Phillips* objected to the reading of the deposition, because no subpoena had been taken out; but the evidence was admitted.*

The witness deposed, that in the year 1805, he was a clerk in the counting-house of Lewis Crousillat, where Rankin, the intestate, was first an apprentice, and afterwards a clerk. That Rankin went to sea, and left Crousillat to settle and ad-

(a) 4 Dall. Rep. 205.

* A contrary rule prevails in the Court of Common Pleas of the first judicial district. *Reporter.*

just all his concerns during his absence, as the witness, afterwards, on the return of the intestate, was informed by him. That he, the witness, had examined a certain paper, purporting to be a release to the defendant from his creditors; that the name of Lewis Crousillat signed thereto, over the words "for Alexander Rankin," was in the hand writing of the said Lewis Crousillat. That he, the witness, was in the said counting-house when the defendant brought a paper to be signed, which, he believed, was the same.

1811.

RANKIN,
administrator,
&c.
against
COOPER.

Hallowell then produced the paper, and offered it in evidence; it was dated the 27th day of May, 1805; opposite to the name of Crousillat there was a seal, and at the foot of the instrument was written "sealed and delivered in presence of us" but there was no *subscribing witness*.

To the admission of this paper *Phillips* made two objections.

First, That there was no proof of the sealing and delivery, and

Secondly, That there was no evidence that Crousillat had *authority under seal* to execute a release for the plaintiff's intestate.

Hallowell supported the legality of the evidence under each of the pleas.

First, Under the plea of a release, considering the paper as a release, strictly and technically speaking, and

Secondly, Under the plea of payment, as a paper signed by Crousillat, as attorney for Rankin, acknowledging that the demand was satisfied. He admitted the rule to be, that when there were subscribing witnesses to the execution of a deed, they must be produced, or their non production satisfactorily accounted for; formerly it was held, that the appearance of the subscribing witnesses was indispensable; but this rule had been very properly relaxed; and in a late case in the Supreme Court, (a) a bond was offered in evidence, and upon proof being made that the subscribing witness was out of the jurisdiction of the court, and upon diligent inquiry no

(a) 3 Binney's Reports 192, Clark, ex. &c. against Sanderson, ex. &c.

1841.

RANKIN,
 administrator,
 &c.
against
COOPER.

person could be found within the jurisdiction, who could prove his hand writing, evidence of the hand writing of the obligor was admitted. So, in this case, he said, that there being no subscribing witness, it was impossible to produce any; and therefore, proof of the party's hand writing was the best evidence of the sealing, which the nature of the case would admit. As to the *delivery*, the release was in possession of the defendant, which was the strongest evidence thereof.

On the second point he observed, that if the court should be of opinion, that this paper could not be considered in the light of a release, properly speaking; or if they should think, that to entitle Crousillat to execute a release in the name of Rankin, he should have been authorized by a power of attorney under seal, he would, in either case, submit to the court, whether the paper was not strictly legal testimony under the plea of "payment;" in order to induce a belief in the minds of the jury that the debt was, to the satisfaction of the plaintiff's intestate, fully paid and settled; and, from the deposition of Washington Perkins it was easy to collect sufficient evidence of the general authority vested by Rankin in Crousillat "*to settle and adjust all his concerns.*" Chief Justice Tilghman(a) had cited with approbation the case of Butler against Rhodes,(b) where Lord Kenyon ruled, that a creditor, who had *verbally* agreed to take a composition from his debtor, in consequence of which the debtor had made an assignment of all his estate, was not permitted to relinquish the composition and maintain an action for his debt.

Phillips, in reply, remarked, that the paper purported to be under seal, and therefore must be admitted as a release, or it could not be received in evidence at all: and against admitting it as a release there was an insurmountable objection, viz. That Crousillat had not produced any authority under seal from Rankin.

PER CURIAM. Hemphill, president.

(a) 2 Bin. Rep. 182, Lippincott against Barker.

(b) 1 Esp. Rep. 236.

It is unnecessary to give any opinion on the objection that there is no evidence of the sealing and delivery of this paper, as the court are clearly of opinion, that it is inadmissible on the other ground. Before the instrument can be admitted as evidence, it is incumbent on the defendant to shew, that Crou-sillat was authorized, *by deed*, to execute a release for Rankin.

1811.

RANKIN,
administrator,
&c.
against
COOPER,

Evidence rejected.*

BOUTLIER against JOHNSON.

1811.

June 6.

ADDIS for the plaintiff, moved for a commission to foreign parts, on the usual terms, which was granted. He had instituted the suit at the instance of the wife of the plaintiff, the plaintiff being at sea.

The court refused to order that a rule for a commission should stay until the attorney applying for the commission filed his warrant.

Peters now moved for a rule on the plaintiff's attorney to file his warrant of attorney, returnable the next Saturday; and also, prayed that the rule for a commission might stay, until the power was filed; But

PER CURIAM. *Hemphill, president.* It is not unusual to issue writs in this way: we will grant the rule to file the warrant of attorney, returnable the next term; but the commission may issue in the mean time.

Rule on the plaintiff's attorney to file his warrant, returnable next term.

* To this opinion a bill of exceptions was tendered and signed, after which a writ of error was taken to the supreme court.

1811. HAMPTON, assignee of KNIGHT *against* ERENZELLER and
June 17. BAKER.

When a computation of time is made from an act done, the day on which the act was done must be included; but when the computation is from the day itself, then the day is excluded.

There are no fractions of a day, unless to prevent a great mischief.

The day on which an award of arbitrators is entered, is included in the twenty days, within which an appeal must be entered.

Excepting to the bail on an appeal from the decision of arbitrators, is not a waiver of the right to move to strike off the appeal.

IN this case it appeared, that a rule of reference had been entered on the 14th day of March, 1811, agreeably to the act "regulating arbitrations," passed the 20th day of March, 1810; that an award in favour of the plaintiff for five hundred and forty one dollars and one cent, was entered on the docket, in the office of the prothonotary, on the 12th day of April, 1811; that the defendant had entered an appeal, with bail and recognizance, on the 2d day of May 1811; and that on the 3d day of May, the plaintiff's attorney excepted to the bail, who justified on the 6th of the same month.

Phillips, for the plaintiff, obtained a rule to shew cause why the appeal should not be struck off, on the ground that it was not entered within the time prescribed by the Arbitration Act.

He contended, that the day on which the award was filed in the office, and the day on which the appeal was entered, must both be considered as part of the twenty days, within which the act requires the appeal to be entered; according to which computation, the appeal in this case was entered on the 21st day after the filing of the award.

Addis, for the defendants, replied, that in all judicial proceedings, where an act was required to be done within a given number of days, one day was considered as inclusive, and the other as exclusive. The words of the arbitration act are, that the appeal shall be entered "within twenty days after the entry of the award of arbitrators on the docket;" from which it was evident, that the legislature did not intend, that the day on which the award was entered should be considered as one of the twenty days. He also insisted, that the plaintiff had waived his right of objecting to the appeal, by excepting to the bail.

PER CURIAM. *Hemphill*, president.

If the day on which the appeal was entered is to be excluded, the appeal will be within time, if included, the appeal is too late.

1811.

HAMPTON
assignee of
KNIGHT
against
ERENZELLER
and
BAKER.

The rule of law is, that when the computation is to be made from *an act done*, the day on which the act was done must be *included*; but when the computation is to be *from the day itself*, and not from the act done, then the day on which the act was done must be excluded. It is also a rule of law, that there is no fraction of a day, unless where it is to prevent a great mischief or inconvenience; (a) the words in the eleventh section of the arbitration act are "And the party, his, her, or their agent or attorney, shall enter such appeal with the prothonotary of the proper county, with the bail and recognizance hereinafter required, *within twenty days after the entry of the award of the arbitrators on his docket.*" The court are of opinion that the day on which the entry of the award was made is to be *included*, and that therefore, in this case, the appeal has been entered too late.

It has also been contended, that the plaintiff waved his right of objecting to the appeal by excepting to the bail: the court cannot consider the circumstance of merely excepting to the bail, in that point of view; it was an act done immediately after the appeal was entered, and in opposition to the appeal. Let the rule to shew cause why the appeal should not be stricken off be made absolute.

Rule absolute.

(a) 1 Lord Raymond 281. 20th Vinor's Abt. 268, 7, 8. tit. time letter A.
2 Roll's Abt. 520. pl. 8.

1811.

PAUL against PURCELL.

June 17.

PAUL against M'KEE.

The court refused to strike off a rule for arbitration, which had been entered by a plaintiff, in an action commenced by a *capias*, after the defendant had appeared by counsel but before special bail had been entered.

Quere, if the bail is thereby waived?

THESE actions, one against the drawer, and the other against the indorser of a promissory note, were instituted to June term, 1811, by writs of *capias*, to which the sheriff returned "*cepi corpus* and bail bond." Before the return day, *Addis*, had entered his appearance for both the defendants. On the 4th of June, the next day after the return day, and before special bail had been put in, the plaintiff entered rules for arbitration.

Addis, for the defendants, had obtained rules, returnable this day, on the plaintiff, to shew cause why the rules for arbitration should not be struck off, on the ground that the defendants were not in court, special bail not having been entered at the time the rules of arbitration were entered by the plaintiff.

He contended, that the defendant's appearance could be effected only by his entering special bail, and that he was never considered as in court, until the special bail was entered, even though he had appeared by attorney.(a)

That the plaintiff could not try the cause by a jury, until special bail was entered; and that although the words of the arbitration law were very general, still it never could have been the intention of the legislature, to allow a party to arbitrate a cause which was in such a state that it could not be tried, and which, strictly and legally speaking, was not in court.

Lloyd contra, admitted, that in England the law was as stated by the defendant's counsel, but contended that the practice in Pennsylvania was, in some respect, different. In England, the plaintiff's filing a declaration before the special bail was entered, unless it be filed *de bene esse*, was of itself, a waiver of the bail; but in Pennsylvania, the practice had

(a) 3 Black. Com. 290. 1. 3 Viner's abt. 464, title bail.

DISTRICT COURT, &c.



been decided to be otherwise.(a) It was true, that they could not try the cause without waving the bail, but there were many cases in which a cause might be arbitrated, when it could not be tried. It was the constant practice to arbitrate causes that were not at issue, where neither declaration had been filed, nor plea put in; and yet no court would suffer a cause thus situated to be tried by a jury.

1811.

PALL
against
PURCELL.
PAUL
against
M'KEE.

The decision of this question did not depend on common law authorities, but on the words of the act of Assembly, which were clear and explicit, “That it shall and may be
“lawful for either party, his, her, or their agent or attorney,
“in all civil suits or actions, pending, or that may hereafter
“be brought in any court of this commonwealth, hav-
“ing either original or appellate jurisdiction of such suits
“or actions, to enter, at the prothonotary’s office, at any
“time after the entry of such suits or actions, a rule of re-
“ference, &c.”

It was evidently the intention of the legislature, when they passed this act, that the parties should be allowed to arbitrate the cause at any time after the plaintiff’s process was served on the defendant. If this rule should be made absolute, it would deprive the parties of the right to arbitrate at the time they felt most disposed to do so, within six weeks after the return of the writ. By a rule of this court, the plaintiff cannot sue out the bail bond, and compel the defendant to put in special bail, until six weeks after the return day; but there could be no doubt that they had a right to arbitrate the actions if they chose to incur the risk of exonerating the bail. The only question which could arise, was one which was not then before the court, that was, whether the entering of the rules of arbitration amounted to a waiver of the bail.

PER CURIAM.

Hemphill, president.

(a) 2 Dall. Rep. 141.

CASES IN THE

1811.

PAUL
against
PURCELL.
PAUL
against
" "

These actions were brought to June term, 1811. On the 4th of June, the day after the return of the writ, the plaintiff entered rules for arbitration under the act regulating arbitrations. A rule has been obtained, to shew cause why the rules should not be struck off; the attorney for the defendant alleging, that as no special bail has been put in to the action, the defendant is not in court; and that the action is not *pending* within the meaning of the first section of the arbitration act. The words of the act are, that "*at any time after the entry of such suits or actions, a rule of reference may be entered.*" The defendant has six weeks after the return of the writ, to put in special bail to the action; yet, before special bail is entered, he may be considered in court *for some purposes*; he may move for a rule on the plaintiff, to shew his cause of action, or he may obtain a rule to take depositions; the plaintiff may, in any case wave his right to special bail and proceed to trial: in these cases, if he chooses to incur the risk of waving his right to special bail, the court are of opinion, that the defendants cannot object to the arbitrations.*

The rules to shew cause why the rules for arbitration should not be stricken off, must be discharged.

Rules discharged.

1811.

HART against ISRAEL.

June 22.

The tenant in fee of lands leased them for a year; before the expiration of the term, the sheriff, by virtue of legal process against the lessor, sold the premises, and it was held that the purchaser was entitled to the rent.

THIS was an action of trespass *vi et armis quare clausum fregit*.

On the tenth day of October, 1805, James Crawford, then being the tenant in fee simple of the premises in question, made a lease thereof to the plaintiff, for one year.

* In the case of Hertzog against Ellis, 3 Bin. Rep. 209, it was decided by the court, that immediately after special bail is entered in compliance with a notice, either party is entitled to enter a rule of arbitration, though before the return day of the term of which the suit is docketed.

Quere, whether a suit commenced by a *capias* or summons can be arbitrated *before the process is served*? In the above mentioned case of Hertzog against Ellis, that point was not judicially before the court, but the Chief Justice, and Brackenridge justice, say that *the action is entered from the time it is placed on the prothonotary's docket.*

REPORTER.

By virtue of legal process against Crawford, the sheriff sold and conveyed the premises to the defendant; the deed was dated the 12th of June, 1806, and was acknowledged on the next day.

1811.

HART
against
ISRAEL.

On the 11th day of October, 1806, the defendant came to demand his rent; the plaintiff tendered to the defendant the amount of the rent from the day of the sale by the sheriff, which the defendant refused to receive, but distrained for the whole year's rent.

It was for the alleged trespass, in entering on the premises and making the distress, after the tender aforesaid, that this suit was brought; and one question that arose was, whether the defendant was entitled to the rent for the whole year, or only from the time of the sale by the sheriff.

Leib and Hopkinson for the plaintiff.

Milnor and Ross for the defendant.

The COURT, *Hemphill* president, after stating the facts on this point, said that it was a general rule, that rent should follow the reversion.(a) That by an act of Assembly, passed the 6th of April, 1802,(b) the purchaser of an estate at sheriff's sale is substituted in the place of the defendant, as whose property the premises are sold, and is entitled to the same

(a) 2 Black. Com. 13 edit. 176. Coke. Lit. 143.

(b) The third section of the act to which his honor referred, will be found in the sixth volume of Bioren's edition of the Laws of Pennsylvania, 331, and is in these words, "That where any lands or tenements shall hereafter be sold by any sheriff or coroner as aforesaid, which shall be at the time of such sale or at any time afterwards held or possessed by any tenant or lessee or person holding or claiming to hold the same under the defendant or defendants named in the execution, by virtue whereof the same lands or tenements shall be sold by such sheriff or coroner, the purchaser or purchasers of the same lands or tenements shall (after receiving the sheriff's or coroner's deed for the same) be considered as the landlord or landlords to such tenant or lessee or person claiming to hold the same under the aforesaid defendant or defendants, and shall have the like remedies by distress or otherwise to recover any rents due subsequent to such sale as the same defendant or defendants as whose property the same lands or tenements shall be sold, might or could have if no such sale should take place; and if, after notice of such sale, the said tenant or lessee or other person occupying the premises as aforesaid shall pay any rent to the defendant or defendants as whose property the same premises may have been or shall be sold as aforesaid, the said tenant or lessee or other occupier as aforesaid shall be liable to repay the same to the purchaser or purchasers aforesaid."

1811.

HART
against
ISRAEL.

remedies, by distress, or otherwise, to recover the rent. That under this act, the question would be, what rent was due at the time of the sale by the sheriff. And it was the opinion of the court, that where a sale takes place in the middle of the year, the purchaser is entitled to the rent, although he cannot demand the same until the end of the year.

1811.

MOFFET against DORSEY.

July 1.

A submission was made to referees, who awarded for the plaintiff, two hundred and forty-three dollars sixty-one cents, and that the plaintiff pay the costs and that he had no cause of action. The court entered judgment for the plaintiff with costs.

IN this case the following submission had been made to referees, the 4th of June, 1811.

“ All matters in dispute between the parties in this action are referred to J. L. &c. the award of whom, or any two of them, shall be binding on the parties, without appeal.”

The referees on the 5th of June, 1811, made a report in these words: “ We the subscribers the within named referees, having heard the parties and their witnesses, do find and award that there is due to the plaintiff from the defendant the sum of two hundred and forty-three dollars sixty-one cents, and the plaintiff to pay the costs, and that he had no cause of action.”

To this award, no exceptions were filed by either party.

On the 6th of June, Ewing, for the plaintiff, addressed a letter to the defendant, requesting payment; and on the next day, the defendant paid him the sum of two hundred and forty-three dollars sixty-one cents, and took a receipt “ for the amount of the award.”

On the 8th day of June, Ewing obtained a rule to shew cause why the judgment should not be entered with costs.

It was now argued by *Rush* for the plaintiff, and *Meredith* for the defendant.

For the plaintiff it was contended, that the referees had

no power to throw the costs on the party, in whose favor an award was made, in an amount that carried the costs.(a)

1811.

MOFFET
against
DORSEY.

For the defendant it was answered, that the counsel for the plaintiff, by accepting the amount of the debt, had confirmed the award; and he would not afterwards be permitted to allege any thing against it. It was also contended, that a case could be supposed, in which the referees would have had a power over the costs, as, where the money had been tendered, and the court, in support of the award, would infer that such a case had existed. The case of M'Laughlin and Scot (b) was referred to, and relied on as of higher authority than those cited for the plaintiff.*

PER CURLAM:

Hemphill, president.

There being no references in England, similar to those under our acts of Assembly, no arguments thence can be satisfactorily drawn.

In Pennsylvania, reports of referees are placed upon the same footing with the verdicts of juries. The cases decided by Judge Rush in the Common Pleas,(c) differ but little from the present: in those cases the law is expressly laid down to be, that if the plaintiff files no affidavit, agreeably to the fourth section of the one hundred dollar law, and recovers a sum which does not amount to more than one hundred dollars, he shall not recover costs; the law is equally clear, that if the plaintiff recovers a sum which amounts to more than one hundred dollars, he is entitled to costs; and the referees can have no greater power over the costs in the one case, than in the other.

(a) 2 Bin. Rep. 588. Guier against M'Faden. 1 Browne's Rep. 194, Lindenburger against Unruh, 231 Heath against Atkinson.

(b) 1 Bin. Rep. 61.

(c) 2 Bin. Rep. 587. Browne's Rep. 194 and 231.

* Vide Stuart against Harkins, 3 Bin. Rep. 323, where the Chief Justice says, "the case of Mr. M'Laughlin against Scot, appears to have been decided "hastily, and on very little argument."

REPORTER.

1811.

 MOFFET
 against
 DORSEY.

The case of *McLaughlin* against *Scot*(a) is not exactly similar to that now under consideration; it was founded upon the act of the 25th of September, 1786; yet, in principle, there would have been no very material distinction, had it not been for the act of the 21st of March, 1806, entitled, “An Act to regulate Arbitrations, and proceedings in Courts of Justice,” which act has a considerable bearing on the present question.

The second section prescribes the *manner* in which references shall be made.

By the third section, the referees are to be sworn or affirmed to try the *cause* referred to them, and to make out an award, agreeably to the terms of the submission; the award is to have the same effect, and to be recovered in the same manner as a judgment entered by the court, on the verdict of a jury.

This section further provides, “that in case either party files exceptions to the award entered or filed, and the same be finally set aside by the court; if it be the plaintiff filing such exceptions, and he shall again prosecute his action either in a court of justice or *before referees* and shall not recover a sum equal or greater than was first awarded, he shall not have judgment for costs;” the inference is irresistible, that he shall have judgment for costs on the first award; and there is no power given to the referees, to take the costs away from him; they can only report agreeably to the terms of the submission: and it has not been pretended that in this case, the terms of the submission gave the referees any power over the costs.

By the fourth section it is provided, that if either of the parties do not appear on the day appointed for the referees to meet, the party neglecting to appear, either by himself, his agent, or attorney, shall be *liable for all costs* which may have accrued on that day in said action, *unless it be made appear to the satisfaction of the referees, that the absent party could not attend.*

The legislature having had, in the above act, the subject of costs particularly in their contemplation, and having given to

(a) 1 Bin. Rep. 61.

the referees a power over the costs, in a specified case, it is not to be inferred, that it was their intention, that the referees should have a *general power* over the costs, unless given to them under the terms of the submission.

1811.

 MOFFET
against
DORSEY.

On the argument, it was urged, that if a case could be supposed, in which the referees would have been authorised by law to have made an award similar to the present, that supposition, in itself, ought to be sufficient to induce the court to confirm the report as made; and it was suggested, that a *tender* might have been made agreeably to law, in which case the plaintiff would not have been entitled to costs; that may have been the fact in the present case; yet, if the argument prevails, it must prevail in every case, whether that fact exists or not; for it could be supposed with equal propriety in all cases. The court can only regard the submission and report.

Let the judgment be entered with costs.

Judgment with costs.

TYBOUT against THOMPSON and TAYLOR.

1811.

July 1.

THE principal facts in this case were as follows:

Andrew Tybout, the plaintiff, was the agent of John M'Clelland of South Carolina, and had usually paid his notes at bank. The defendants, Thompson and Taylor, deposited in the Bank of the United States, for collection, a note for one hundred and twenty-five dollars fifty-two cents, drawn in their favour by John M'Clelland of Frankford. The runner of the bank left a notice of the time this note would become due, at the store of the plaintiff. The plaintiff, by Richard Tybout his son, paid the amount of the note at bank, and took it up, not observing that it was the note of John M'Clelland

If one man, by mistake, and without any obligation, pays the debt of another, he shall recover it back, unless the party receiving the money, was injured by the mistake.

1841.

TYBOUT
against
THOMPSON
and
TAYLOR.

of *Frankford*, although "*Frankford*" was written at the bottom of the note.

Finding on his father's books no account of this note, and seeing the names of Thompson and Taylor on the back of it, Richard Tybout went to their store, and had an interview with Taylor, to whom he represented, that he desired some voucher to convince John M'Clelland of *South Carolina*, that his father Andrew Tybout had paid and taken up his note. Taylor hesitated, but at length wrote on the back of the note, over their indorsement, "*Received of A. Tybout.*" He did not however disclose to Tybout that there was a mistake, and that it was not the note of John M'Clelland of *South Carolina*, but of John M'Clelland of *Frankford*. After a lapse of three or four months, John M'Clelland of *South Carolina* came to Philadelphia, and the plaintiff, by him, was first made acquainted with the mistake. Upon looking over the note again, he discovered "*Frankford*" written at the bottom. The plaintiff's son and John M'Clelland of *Frankford*, went to Taylor; Tybout, the son, requested him to refund the money immediately. John M'Clelland of *Frankford*, said to Taylor, "*Sir, I am astonished at you for having taken the money, when I gave you fifty or sixty dollars on account of the note, and you promised to withdraw it from the bank, and give me time for the balance.*" Taylor did not deny the assertion of M'Clelland, but only replied, that M'Clelland should have paid the whole money at the time. Taylor further told the son of the plaintiff, that he had lost money by Thompson his partner, and that the plaintiff might get the money of him if he could; he added, that the plaintiff had no business to take up the note, he ought to have looked sharp.

On the part of the defendant, it was proved, that John M'Clelland of *Frankford*, was indebted to Thompson and Taylor, on a book account, in a sum exceeding the amount of the note; for a part of which, it was said, that the note was given.

The charge of the court was, in substance, that if the jury were of opinion, that under the circumstances of the case,

Thompson and Taylor had sustained no injury by the mistake, that, in equity and good conscience, they were bound to refund the money; but on the other hand, that if any loss had been occasioned by the mistake of the plaintiff, he ought to bear it.

1811.

TYBOUT
against
THOMPSON
and
TAYLOR.

The jury found a verdict for the plaintiff, for the amount paid, together with interest.

Cundy, for the defendant, now moved for a rule on the plaintiff, to shew cause why a new trial should not be granted, on three grounds.

1st. That the verdict was against the evidence.

2ndly. That it was contrary to law, and

3dly. That the court, in their charge, had misdirected the jury.

It was argued by Cundy for the defendants, and Browne for the plaintiff.

Per CURLIAM.

Humphill, president.

The general principle of law is, that money paid through mistake, ought to be refunded.(a) In one book(b) it is said,
 “ When money is paid by one man to another, on a mistake,
 “ either of fact or of law, or by deceit, an action for money
 “ had and received will certainly lie. But the proposition is
 “ not universal, that whenever a man pays money which he is
 “ not bound to pay, he may, by this action,(c) recover it back.
 “ Money due in point of honour and conscience, though a man
 “ is not compellable to pay it, yet, if paid, shall not be recovered back.”

It has never been decided, that if one man, by mistake, pays the debt of another, he shall not recover the money

(a) 1 Salk: 22, Tomkins against Bernet, 2 Wm. Blackstone's Rep. 825, Farmer against Arundel.

(b) Ibid.

(c) Money had and received.

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TAYLOR.

back; it is included within the general principle, which applies to money that he was not bound in honour or conscience to pay. If Tybout, by a mere mistake, and without any obligation, paid the debt of M^cClelland of *Frankford*, can it be retained by Thompson and Taylor? Why is it, that this case should form an exception to the general rule? We can perceive no reason, unless Thompson and Taylor could have shewn, that they had been *injured* by the mistake. In that case, we admit that the person making the mistake ought to bear the loss thereby occasioned: but that was a matter of fact to be judged of by the jury; and it was submitted to their consideration.

If the defendants had shown the least probability that the note would have been paid by M^cClelland of *Frankford*, had it not been for the mistake of the plaintiff; or that they were, in any other respect, placed in a worse situation by the act of the plaintiff, the jury were at liberty, under the charge of the court, to take the circumstances into their consideration. On the contrary, we think that the evidence given by the plaintiff was sufficient to satisfy the jury, that the defendants had sustained no injury by the mistake; M^cClelland of *Frankford* did not intend to take up the note to prevent a protest; for he supposed it had been withdrawn from the bank by the defendants. Taylor did not, in any conversation with the witness, allege that they had sustained any loss by the mistake.

The court are therefore of opinion, that justice has been done between the parties, and they are not convinced that the verdict is against law. An application for a new trial, is an appeal to the discretion of the court; and it ought not to be granted when justice has been done on the first trial, unless the verdict is *clearly* contrary to the well known and established principles of law. In some instances, where verdicts have been against the strict rule of law, the court would not grant a new trial.^(a)

The rule to shew cause why a new trial should not be granted, is refused.

Rule refused.

(a) 1 Bur. 54, Farewell, Esq. against Chaffey and others.

COURT OF
Common Pleas

OF

YORK COUNTY.

PECKER and another, administrators of PECKER, who was assignee of MACKIE, against JULIUS, surviving executor of CRONBACH.

1811.

August 12.

CASE stated for the opinion of the court.

This suit is brought upon a bond, dated the 9th of April 1794, executed and delivered by Jonas Yoner and Jacob Cronbach to William Mackie; who, on the 18th of February 1795, assigned the said bond to John Pecker, since deceased, (prout the bond and assignment.) The bond was given as part of the consideration of a tract of land, purchased by Yoner, of Mackie, in which the said Jacob Cronbach joined as his surety merely. On the 18th day of November 1803, in the state of Maryland; a suit was brought on the bond, against Yoner, and judgment was obtained therein, on the 9th day of January 1805, (prout the record.) The said Yoner took the benefit of the insolvent laws of Maryland, on the 21st day of May 1804, (prout record.)

Nothing has been recovered, from him, or from any one else, on account of said bond. The said Jacob Cronbach died on

came insolvent: it was held, that an action could not be maintained against the deceased surety, for the amount of the bond.

The following words "To which payment well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and every of them, firmly by these presents," make a joint and not a joint and several bond.

Two persons, one as principal and the other as surety, executed a joint bond: the surety died, and the principal, surviving, be-

came insolvent: it was held, that an action could not be maintained against the executor of the

1811. the first day of April, 1796, leaving the said Yoner surviving him.

PECKER and another, administrators of PECKER, who was assignee of MACKIE against JULIUS, surviving executor of CRONBACH.

At the time of executing the bond, the said Yoner was considered and reputed to be a man in good circumstances.

The question submitted to the court is, can the plaintiff maintain an action on this bond, against the executors of Jacob Cronbach.

Cassat and Bowie, for the plaintiff, and

Kelly and Hopkins, for the defendant.

PER CURIAM. *Franklin*, president. (After stating the case,)

The first point for our consideration respects the nature of the bond in controversy, whether it be a *joint*, or a *joint and several obligation*? For if it be the latter, there is nothing to preclude the plaintiffs from a right to recover.

The words of the bond, as far as they relate to this question, are as follow: "Know all men by these presents that
" we Jonas Yoner of Barwick township, and Jacob Cron-
" bach of Dover township, both in York county and state of
" Pennsylvania are held and firmly bound unto William
" Mackie in the sum of one hundred and twenty pounds law-
" ful money of Pennsylvania, to be paid to the said William
" Mackie or to his certain attorney, executors, administrators
" or assigns: To which payment well and truly to be made
" and done we bind ourselves, our heirs, executors, adminis-
" ters and every of them, firmly by these presents."

" The condition of the above obligation is such, that if the
" above bounden Jonas Yoner and Jacob Cronbach or any of
" them shall and do well and truly pay &c."

The only expressions which can create a doubt as to the legal effect of this instrument, are the words "*and every of them*," contained in the penalty of the bond. Upon a full consideration of the authorities which were cited in the argument, and the legal principles which were maintained by the counsel on both sides, we think that those words cannot, in just grammatical construction, be made to refer to the parties using

them; that they apply only to their immediate antecedents "heirs, executors, administrators;" and do not include, or extend to the obligors themselves, so as to make them separately and individually liable; and that, therefore, this is a joint and not a joint and several bond.*

Considering this, then, as a joint bond, let us next examine whether there be any thing in the case, to prevent the application of the common law principle, which declares that where two are bound jointly, the survivor only is liable, and not the representative or estate of the deceased obligor.

It was contended by the counsel for the plaintiff, that as there is no court of chancery in this state, our courts have adopted many of the rules which prevail in a court of equity; that they permit a plaintiff to recover in most cases, in which a court of chancery in England would grant him relief against the rigid principles of the common law; and that there equity has frequently interfered, to enforce a moral obligation against the representatives of a deceased obligor, where the debt was extinguished at law; as in *Simpson against Vaughan*, (a) where money was lent to two persons who were partners in trade, and through want of skill the bond was made a joint instead of a joint and several bond; so in *Bishop and Church*, (b) where both obligors received the benefit of the loan, and the survivor became bankrupt. The correctness of the decisions in these cases has not been questioned, but their applicability has been denied. No case has been cited, and I presume none can be adduced, in which the estate of an obligor in a joint bond, who was a mere surety for his co-obligor, and partook of no part of the consideration, has ever been held liable, where the principal has survived him, although such principal may have become a bankrupt. In this case it is agreed, that the conveyance of the land, for which the bond was given, was made to Yoner alone; and that Cronbach had no interest in it. Upon what ground then can his estate be rendered liable, when the remedy at law was extinguished as to him? And in equity a surety is not chargeable further than he is answerable at law. (c)

1811.

PECKER and another, administrators of PECKER, who was assignee of MACKIE, against JULIUS, surviving executor of CRONBACH.

* See the case of *Thomas against Frazer*, 3 Vesey junr. 399.

(a) 2 Atkins 33. (b) 2 Vesey 100. (c) 1 Vernon's Rep. 196, 197.

1811.

PECKER and
another, admi-
nistrators of
PECKER, who
was assignee
of MACKIE,
against
JULIUS, sur-
viving execu-
tor of
CRONBACH.

In Harrison, executor of Minge, against Margaret Field, executrix of James Field, determined in the court of appeals of Virginia, (a) Field, the testator, having loaned to William Claiborne a sum of money, he, together with Minge as his surety, executed a *joint bond* to the testator, for the payment of it; Minge died in the lifetime of Claiborne, who became insolvent. The object of the bill was to recover the debt from the executor of Minge. The court decided that the testator Minge, having been neither the borrower, nor the user of the money lent to, and used by Claiborne, but a surety only, ought not in equity to be further, or otherwise bound, than he was bound by the contract at law; and no fraud or mistake appearing to have occurred in the writing of the bond, it was to be considered as a joint obligation, and subject to the legal consequences, of Minge and his representatives being discharged by his death in the lifetime of Claiborne.

In the case before the court, no fraud or mistake has been suggested; Cronbach was no party to the conveyance; he was no more than a surety in the bond; his estate is exonerated from the payment of it, by the operation of the common law, and there remains no moral obligation upon his executors to discharge it. We are therefore of opinion that the plaintiff cannot maintain this action, and that judgment ought to be entered in favor of the defendant.

Judgment for the defendant.

(a) 2d Washington, 136.

CASES

IN THE

District Court,

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

SEPTEMBER TERM, 1811.

GUIER *against* PEARCE.

1811.

September 4.

THE demand of the plaintiff in this case, was for goods sold the 15th of August 1800; to which, the defendant pleaded "*non assumpsit infra sex annos;*" the plaintiff replied, a new promise within six years. The evidence was, that the defendant, after the expiration of six years, *acknowledged the receipt of the goods, said he thought he had paid for them, and should rely upon the statute of limitations.*

An acknowledgment, to take a case out of the statute of limitations, must be such a one as is consistent with a promise to pay.

Levy for the defendant, contended, that these expressions did not take the case out of the statute. He said, that soon after the statute of James.(a) it had been decided in England, that a new promise to pay, made within six years, would revive the cause of action, and take the case out of the statute of limitations; and he admitted, that a considerable time after, it had been determined, that a *bare acknowledgment* of the

(a) 21 James 1. c. 16.

1811.

 GUIER
 against
 PEARCE.

debt, though it was not of itself a new promise, was *evidence* of one. But he insisted, that the acknowledgment must be *unconditional*, otherwise it had never been esteemed sufficient. It was true, there were some oscillatory cases on this subject to be found in the books, but ever since the decision in *Owen against Wolley*,^(a) the law had been considered as settled; in that case the defendant had said "I acknowledge the receipt of the money, but the *testatrix* gave it to me;" and Mr. Baron Clive directed the jury to find for the defendant; for, he said, an acknowledgment could not amount to a promise to pay, when the defendant insisted that he was entitled to retain. *Levy* added, that similar determinations had taken place in Pennsylvania, both in the state courts and the circuit court of the United States. He referred to the case of *Warder against Heyberger*,^(b) and also the case of *Read against Wilkinson*, in the circuit court of the United States, which he begged leave to cite from a MS report that he held in his hand.^(c)

S. Shoemaker for the plaintiff, insisted, that the plea of the statute of limitations was not to be favoured; that courts of justice, and especially those of our own country, had leaned against it. In *Whitcomb against Whiting*,^(d) the court laid down the position, that the law raises the promise to pay, where the debt is admitted to be due: and in the case of *Cowan against Magauran*,^(e) which was an action on an inland bill of exchange, the defendant, upon seeing the bill, seemed very much distressed, and said "that he never had had property of the drawers in his hands to pay it; that there were other bills on which his name was, to a large amount, and if even he was to pay this, he would not be able to pay them; and requested the witness, for these reasons not to put it in suit, as he was going to Philadelphia, and would consult his friends; and on his return would call and give an answer." sometime after, the defendant wrote a note, in which he said "that he had taken advice, and found that by the laws

(a) Buller's N. P. 148.

(b) Not reported.

(c) Vide appendix, p. 15.

(d) Douglass 652.

(e) Wallace's Rep. 66.

“ of the country, he was not bound to pay the bill.” Upon this evidence, the chief justice, Tilghman, declared it to be his opinion, “ that consistently with established principles, “ the jury might have found for the plaintiff.”

1811.

GUINN
against
PEARCE.

PER CURIAM.

Hemphill, president.

The plaintiff's demand arises on a sale of goods in the year 1800. This action was instituted in 1808, after a lapse of about eight years. The defendant relies on the statute of limitations, which is a positive bar to the claim after the expiration of six years; so much so, that although the court and jury should think, that in reality the debt has never been paid, they are bound by the law, and cannot lend their aid to its recovery. The act is founded in good policy; there should exist a period when disputes between individuals should be terminated. Every country has fixed a time after which the door is shut against litigation. The statute is also founded in honesty; parties are liable to lose their receipts, their witnesses may die, and stale demands may afterwards be produced. The principle applies to the most solemn instruments; a bond is presumed to be paid, after a lapse of twenty years: it extends to real estate; an uninterrupted possession of which for a certain period of time, is conclusive against every claimant.

After an action has been barred by the statute of limitations, a promise has been deemed sufficient to revive it. An acknowledgment, a very slight acknowledgment may be considered evidence of a promise; but then, it must be such an acknowledgment as is consistent with a promise to pay; for the promise is implied from the acknowledgment; whether there has been such an acknowledgment in this case, is for the jury to inquire. The defendant said that he had received the goods, but thought he had paid for them, and would rely on the statute. How is it possible from this to imply a promise to pay? He had a right to rely on the statute; and although its provisions may sometimes bear hard on individuals, we feel

1811. ourselves bound by the law of the land, as expressed by the legislature; in opposition to which, no man has a right to set up his private opinion.

GUIER
against
PEARCE.

The jury found a verdict for the defendant.

1811.

STRUTZER against MORGAN.

September 14.

This court has jurisdiction in all cases of slander, where the damage laid in the declaration exceeds one hundred dollars, without regard to the amount recovered.

IN this case, which was slander, the damage laid in the declaration exceeded one hundred dollars; but the verdict was for five dollars.

Lloyd, for the defendant, moved in arrest of judgment; one ground of his motion was, that the *plaintiff's cause of action*,* as ascertained by the verdict, was under one hundred dollars, and therefore, this court had no jurisdiction of the case.

Ross, contra.

PER CURIAM, *Hemphill*, president. We have previously considered this question, and entertain no doubt but this court has jurisdiction in all cases of slander, where the *damage laid*

* The words of the law are, "provided that the said court shall have no jurisdiction, either originally or on appeal, except where *the sum in controversy shall exceed one hundred dollars.*" It is obvious, that in some cases the court could not possibly judge of the *sum in controversy*, except from the declaration of the plaintiff. The court of common pleas of the first judicial district, seem to consider the damage laid in the declaration, as the sum in controversy, but the judges of that court have allowed a plaintiff to amend his declaration, by altering the damage laid, so as to give them jurisdiction.

Before the passing of the law creating the district court, an appeal was entered to the court of common pleas, by Smith, from a judgment rendered against him by Mr. Alderman Shoemaker, at the suit of Bolton. The plaintiff, in his declaration, had laid his damage at one hundred and twenty dollars. After the erection of the district court, viz. on the 5th of November, 1811, on motion of *Delany*, the court of common pleas granted the plaintiff liberty to amend his declaration, by decreasing his damages to one hundred dollars.

Sed quere. If the court of common pleas had jurisdiction of the cause, why was the motion deemed necessary? And if the cause was, by virtue of the act of Assembly, transferred to the district court, what power had the court of common pleas to grant any motion therein?

REPORTER.

in the declaration exceeds one hundred dollars, without regard to the amount recovered: where the verdict is for more than forty shillings, the plaintiff can recover his costs.

1811.

STRUTZER
against
MORGAN.

PARKER against FARR's administrators.

1811.

September 14.

ON motion of Todd, a rule was obtained to show cause why the judgment signed in the above case for want of an affidavit of defence, should not be opened.

The rule of court, which authorises a judgment to be signed for want of an affidavit of defence, does not apply to cases where executors or administrators are defendants.

Farr, the intestate, had been the garnishee in a foreign attachment, issued by the plaintiff against Bagnold and another; Farr died, pending the attachment. The plaintiff having recovered judgment against the original defendants, and having ascertained, by the verdict of a jury of enquiry, the amount of his debt, had taken the present *scire facias* against the administrators of Farr; and, at the third term, had signed judgment against them, for want of an affidavit of defence, *secundum regulam*.

For the defendants, it was insisted, first, that the rule did not apply to a *scire facias* against a garnishee; and secondly, that it did not authorise a judgment to be signed against executors or administrators.

To the last point was cited the case of Blair against Armstrong.^(a)

S. Shoemaker contra.

PER CURIAM. *Hemphill*, president.

It is unnecessary to consider the first exception, as we are clearly of opinion that the second must prevail. If it were a new question, we should have had some doubts; but the point has been ruled in the case of Blair against Armstrong; and

(a) Decided in the court of common pleas of the first judicial district.

1811.

PARKER
against
FARR'S
administrators

to make a different decision now, would be a surprise on the parties and their counsel, and might occasion great injustice.

The rule to shew cause why the judgment should not be opened, must be made absolute.

Rule absolute.

1811.

M'CARNEY and another against M'CANN.

September 14.

The fifth section of the act "to regulate arbitrations and proceedings in courts of justice," which requires a statement to be filed, applies as well to suits instituted by an attorney, as those brought by a party, without the intervention of an attorney.

A declaration is considered a statement within the meaning of this act.

THIS was an action on the case, commenced by a capias, which was returnable to June term, 1811.

The plaintiff's declaration had been filed *de bene esse*, on the 3d day of June, the return day of the process, by which the suit was instituted; it was a general *indebitatus assumpsit*, for goods sold and delivered. On the 7th day of June, the defendant's counsel had notice that the declaration was filed.

On the 10th day of June, on motion of C. J. Ingersoll, for the defendant, the court granted the following rules.

First, That the plaintiffs shew cause of action, and why the defendant should not be discharged on common bail.

Secondly, That the plaintiffs shew cause why they should not file a statement with their declaration, or be non suited.

John Read produced the plaintiff's affidavit, stating, that the defendant was justly indebted to him in the sum of dollars, for divers goods, wares and merchandises, to him sold and delivered, by the plaintiff. The defendant's counsel, who opened the argument, (a) professed the object of the second

(a) A preliminary question arose, namely, whether upon these rules to shew cause, the plaintiffs' or defendant's counsel should begin and conclude. **Ingersoll** said, that he had observed in the English reports, it was mentioned, that a rule had been obtained to shew cause, "and now the counsel for the plaintiff shewed cause," &c. by which it appeared, that the practice there, was, for the party against whom the rule was taken, to begin and conclude; but he had understood that the practice in this court was different.

Several gentlemen of the bar, of long standing, stated, that the uniform

rule to be, to enable him to plead, in abatement, the pendency of another action for the same cause; which he could not do without the statement; the declaration filed, was so general, that it would embrace any cause of action. He insisted, that the Act of Assembly, "To regulate arbitrations and proceedings in courts of justice," (a) in the fifth section, required a *statement* of the plaintiffs' demand, to be filed, on or before the third day of the term to which the process was returnable; (b) that though it had not been pursued in practice, it was binding on the court. That it had been usual with courts to construe laws with much latitude, and by a little ingenuity of counsel, the legislature were often made to speak a language they never intended. The courts were bound to the observance of the laws, and in their construction of the Acts of Assembly, to pursue the meaning and words of the legislature, more especially, as by the thirteenth section of the act, requiring the statement, they are enjoined strictly to pursue the directions of the Acts of Assembly; "nothing shall be done, " (says this law) agreeably to the provisions of the common law, further, than shall be necessary for carrying such acts "into effect." He went at large into an examination of the law; spoke in approbation of its various provisions; and at the request of the court, read an elaborate opinion delivered by judge Rush, shortly after the passing of the act. (c) He combated the construction put on the act by the learned judge, particularly that part in which his honour considers the provisions of the law, requiring a *statement*, to be confined to the case, where the *party himself* institutes the action, and that in other cases where the suit is brought by an *attorney*, the declaration or narration is sufficient. He insisted, that in Massachusetts,

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practice in Pennsylvania, had been, for the party taking the rule; to begin and conclude, except, that in rules to shew cause of action, the plaintiffs attorney read his affidavit of the cause of action, before the defendants counsel proceeded. Of this opinion was the court, and directed the counsel to proceed accordingly.

(a) Passed 21st of March, 1806, vol. 7, p. 561.

(b) "It shall be the duty of the plaintiff, either by himself, his agent, or attorney, to file in the office of the prothonotary, a *statement of his, her or their demand, on or before the third day of the term, to which the process issued is returnable, particularly specifying the date of the promise, book account, note, bond, penal or single bill, or all or any of them, on which the demand is founded, &c.*"

(c) Vide appendix, page 17.

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where they appear to have a similar law, a statement was deemed essential: this was to be collected from a case decided before chief justice Parsons,^(a) on a writ of error, in which the want of filing a statement, was considered a sufficient cause to reverse the judgment.

John Read, for the plaintiffs, contended, that the second rule was premature, inasmuch as the defendant had not entered bail, nor had he been surrendered, and, of course, he was not in court. That without one or other of these things being done, he could not call on the opposite party, by rule, or otherwise, to proceed in the cause. The appearance of a defendant to a bailable action, must be, either in person, as a prisoner, or by entering special bail; after which followed the pleadings of the party.^(b) Without the presence of the defendant, in one or other of these modes, all proceedings were a nullity. Judgment was arrested in an action of trespass against two, because no bail was entered for one of them, he being no party in court,^(c) which shews conclusively that the court have not possession of the cause, until the defendant does this act. He said, the Act of Assembly requiring the statement from the plaintiff, must, receive a reasonable construction, and it never could be the meaning of the legislature, to require such statement to be filed, when there was no party in court to receive it. Suppose the defendant never did enter bail, (and it is optional with him,) would the law be construed by the court so as to require the plaintiff to do what might be a fruitless act? Compelling the plaintiff to file a statement, before appearance, would be imposing a burthen on him, altho' his adversary had been guilty of laches; inasmuch as the plaintiffs by filing such statements, would be put to expense and trouble. The court would be asked for similar rules, at the very time the party applying for them, never meant to appear to the suit. Besides, there was no penalty imposed by the law, in case the plaintiffs neglected to file their statement, and it must rest with the court to enforce

(a) 5 Mass. Rep. p. 264, Jones against Hacker.

(b) 3 Black. Com. 292.

(c) 3d Viners Abridg. 464. pl. 6.

the duty. This could only be done by either continuing the cause, until the statement was filed, or by dismissing the action; but would the court do either of these, when the defendant had failed to appear, or had not evinced any disposition to do so.

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By reading the case from Dallas,^(a) to show that filing the declaration before the entry of bail, is not a waiver of the bail, the defendant's counsel had unquestionably assimilated the statement to the declaration, and, of course, must submit it to the same rules that govern the declaration; and no principle was better settled, than that a defendant could not call for a declaration, until he had entered bail. By analogy, he ought not to demand the plaintiffs' statement, before he legally appeared to the action "*ubi eadem ratio ibi eadem lex.*" Although the act under consideration, was passed by the legislature to simplify proceedings, and the intention, so far, was proper, it certainly did not deserve the eulogium that had been passed on it by the defendant's counsel. There were many instances where a compliance with its forms, at least, as they were understood by the defendant's counsel, would be productive of injury to suitors; it would often allow dishonest debtors to escape, from the many occasions that occur, in which a creditor, to prevent the loss of his debt, would be obliged to proceed, just before, or on the return day of the writ, when he might not, (in the short space of three days required by the law,) have time to file a minute statement of his demand. Nor was the act necessary, for if the declaration did not sufficiently describe the cause of action, on this being shewn to the satisfaction of the court, they would, at a proper stage of the cause, order the plaintiff to furnish a specification of his demand. It had been avowed by the defendant's counsel, that the object in asking for the statement was to plead in abatement of the action. After such an avowal, the court would not proceed further than the letter of the law would oblige them. Pleas in abatement, inasmuch as they are intended to delay the suit, and preclude an enquiry into the merits of the cause, were not favoured, and the court would, on all occasions, feel an anxiety to discourage them. It

(a) 2 Dall. Rep. 141, read by Mr. Ingersoll.

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was regretted that they had not the law of Massachusetts referred to in the case read by the defendant's counsel. It was to be collected from the case, that the statement there required, was in a proceeding had before a justice of the peace. In cases before magistrates, no declarations are ever filed, therefore, the statement was essential to enable the justice or referees, who decided the cause, to do justice between the parties, and where it was not filed, it was certainly an error. But our act was passed in reference to suits in courts of record, where the *declaration* was the known and where suits were conducted by attorneys, the *only* acknowledged form, in which the plaintiff exhibited his demand to the court.(a) There was therefore an essential and radical difference between the cases.

As to the first rule, he said, that the affidavit was positive. It was drawn from an approved form in Sheridan's Practice in the King's Bench; a book which the late chief justice, Shippen, considered a respectable work, and of authority. It contained all that could be required of a plaintiff to swear to, on a question of bail, namely, that a debt was due, and the cause of action.

PER CURIAM. Hemphill, president.

In this case a declaration has been filed, which contains three counts. 1st. Goods sold and delivered. 2ndly. *A quantum valebant*, and 3dly. Money paid, laid out, and expended.

A rule has been obtained to shew cause why the plaintiff should not file a *statement*, agreeably to the Act of Assembly, passed the 21st day of March, 1806, or be *non suited*.

By the fifth section of the act, it is declared in general terms, " That in all cases where a suit is or may be brought, " for the recovery of any debt founded on a verbal promise, " book account, note, bond, penal or single bill, or all or any " of them, and which, from the amount thereof may not be " cognizable before a justice of the peace, it shall be the duty " of the plaintiff, either by himself, his agent or attorney, to " file in the office of the prothonotary a *statement* of his *de-* " *mand*, on or before the third day of the term to which the

(a) Judge Rush's opinion, vide appendix, p. 17.

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“ process issued is returnable, particularly specifying the date
 “ of the promise, book account, note, bond, penal or single bill,
 “ or all, or any of them, on which the demand is founded, &c.
 “ And it shall be the duty of the defendant, at least twenty
 “ days before the next succeeding term, to which the process
 “ issued is returnable, to file in the office aforesaid, either by
 “ himself, his agent, or attorney, a statement of his, her, or
 “ their account, if any he or she hath, against the plaintiffs
 “ demand, &c. And it shall be the duty of the prothonotary
 “ to file, without the agency of an attorney, such statements.”

It has been contended, that the act only applies to an action brought by the party himself, without the agency of an attorney; but the words of the act are too positive to admit of such a construction; they embrace cases brought before, as well as after the passing of the act; and it is declared, without any reference to the manner of bringing the action, that it shall be the duty of the plaintiff, either by *himself*, his agent, or *attorney*, to file in the office of the prothonotary a statement. The same language is used with regard to the statement, which is to be filed by the defendant; it would be a direct contradiction to say that the parties cannot file their statements by their *attornies*. The subsequent words enjoining the prothonotary to file, without the agency of an attorney, such statements, are more cautionary than absolutely necessary, and only exhibit in strong terms the meaning of the legislature, that any person, being so desirous, may, without the agency of an attorney, conduct his own cause. By an act passed the 24th day of February, 1806, the prothonotary is in like manner required, on the application of any person being the original holder, (or assignee of such holder) of a note, bond, or other instrument of writing, to enter judgment, &c. without the agency of an attorney, or declaration filed. And although these words are used, it is plainly inferible from the act, that a party may, by his attorney, file a declaration, and get his judgment entered accordingly to the former practice. A similar provision is also made in the eighth section of the act under consideration, in relation to amicable suits, where it is made the duty of the prothonotary, to enter them without the agency of an attorney.

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It remains to be decided, what did the legislature mean by the word "*statement*;" it cannot be said to be a technical word, to which any legal signification has been heretofore affixed; it is a word however that has been frequently used in our Acts of Assembly, and it is also to be found in some of our law books.^(a) Wherever the word has been used, the meaning is apparent; it contains, without requiring any formal qualities, a degree of particularity with regard to the account, claim, or transaction, to which it relates. In allowing a statement of the plaintiff's claim to be filed, the legislature evidently intended to simplify the legal proceedings of an action, so as to enable a party to carry on and manage his own cause, if he should be so inclined; no precise form is prescribed by the act; if therefore a party, either by himself, or attorney, chooses to draw his statement in the shape of a declaration, ought it not to be considered to be a statement within the meaning of the act? A declaration on a note, bond, penal or single bill, contains the material requisites of a statement within the meaning of the act, and these are all the cases embraced by this part of the act, except a verbal promise and book account. If a party, without the agency of an attorney, was to bring an action on a promissory note, and had sufficient legal information, to file a declaration in form, which should state the particulars of his claim, both as to date and amount, ought the court to reject it on account of its technical formality? The legislature certainly never could have intended any thing so unreasonable. On the other hand, if he was to file a statement which in itself did not contain a sufficiently accurate specification of his demand, the court would compel him to file a more accurate and particular statement; in like manner if he filed a declaration which was too general, and did not contain the requisites of the act, the

(a) The word *statement* has been used in an Act of Assembly, entitled an act to provide for the settlement of public accounts &c. passed the 4th of April, 1792, section 1. vide 4 vol. Bioren's edition of laws of Pennsylvania 141. In the act to raise and collect county rates and levies, 14th sec. 6th vol, Bioren's ed. L. P. 73, sec. 27, p. 78. See also same vol. L. P. 103. 1 vol. Laws U. S. p. 296. 1 vol. laws of Massachusetts, 333. 7 Bacon's Abridgment 83. Notes. Condry's Marshall on Insurance, p. 474-5. 1 Sellon's Practice, p. 220. 1 Peake's Law of Evidence, 9, in notes. 7 Cranch, p. 71. 2 Bin. p. 473. 7 John. Rep. 268. 2 Peake's Ev. 403.

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court would direct him to file a more particular statement, or in the more legal phrase, a bill of particulars. This may be done (independently of the act) in an early stage of the cause, so as to afford the defendant an opportunity to plead.(b) The idea, that a declaration may be considered as a statement, is corroborated by the sixth section of the act, where the words are used as synonymous terms. By this section, the plaintiff is permitted to amend his declaration or statement, and is not to be *non suited* for informality in any *declaration* or *statement*; from which it clearly appears, that, declarations are not to be entirely abolished. It may be added, that the legal definition of a declaration will pretty satisfactorily answer for that of a statement.(c) The declaration is an explanation of the plaintiff's writ, in which he expresses at large his complaint, setting forth the nature and quality of his case more fully than in the writ; and, as it is the foundation of the suit, the law requires that it contain certainty and truth, that the defendant may be enabled to make a proper answer, and the court enabled to give a right judgment thereon.(d) And we find in one of the modern books of practice,(e) that the word *statement* is selected, as explanatory of the meaning of a *declaration* or *count*.

It is said that the "declaration or count, is nothing more than a *statement* in writing of the cause of complaint."

The court are of opinion that a *declaration* ought to be considered as a *statement* within the meaning of the act. If however the defendant apprehends that the declaration in this case, is too general, and does not afford him a fair opportunity of making his defence, he can move for a rule, or the plaintiff to furnish a bill of particulars, which will answer every purpose he can have in view. A sufficient cause of action has been shewn.

The rule obtained to shew cause, why the plaintiff should

(b) 3 Burr. 1389, 1390, Le Briton against Braham.

(c) 5 Bac. Abridg. 326.

(d) Jacobs' Law Dictionary, title declarations; *Declarations, narratio, legal specification, on record, of the cause of action.*

(e) 1st Sellon's Practice, 220.

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Rules discharged.

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BARTON against HUGHES, and another.

September 14.

By a private act of assembly, J. Biddis, was authorised to vend certain patent rights, through the medium of a lottery, for eighteen months; after the expiration of the time limited, tickets were sold and a bond and warrant of attorney taken for the amount; the court held the consideration of the bond unlawful, and the contract void.

BY virtue of a bond and warrant of attorney, given by the defendants, Miles H. Hughes and John F. Evans, to the plaintiff, James Barton, a judgment was confessed for ten thousand dollars, on the 2d day of January, 1808.

It was afterwards agreed between the parties, that the judgment should be opened, that the defendants should plead "payment," and the plaintiff reply "*non solvit*;" under which issue, the following facts were agreed to be submitted to the court for their opinion, in like manner as if they had been found by a special verdict.

On the twentieth day of January 1806, an act of the assembly of this commonwealth was passed, (a) which recited, that whereas John Biddis had made a discovery, or an important improvement, in the art of manufacturing potato starch, sago and hair powder, and had invented a machine for opening or reducing again to wool, off-cast woollen cloathing; the former of which being so simple in the process that the sale of a single right would make such disclosure as to defeat all the benefits which he had a right to expect; and whereas it was just and reasonable that encouragement should be given to improvements in the useful arts, by securing to the discoverer a reward for his ingenuity and labour; and whereas it was apprehended, that there was danger of incurring the penalty of the law, restraining sales by any mode appearing in the form of a lottery.

It was therefore enacted, That it should be lawful for John Biddis to vend his aforesaid patent rights *for eighteen months*

(a) 7 Vol. Bailey's Edit. 306.

from the date thereof, according to a plan to be by him lodged with, and to be approved of by the governor of this commonwealth; he the said John Biddis, giving the necessary securities for the faithful performance in the premises, and for a full and complete disclosure and exemplification of his patent rights at the end of the said term of eighteen months.

Within the eighteen months, John Biddis lodged with the governor, a scheme or plan for vending his patent rights, and gave the security required by the act.

On the 28th day of December, 1807, James Barton, on behalf of the estate and representatives of John Biddis (who was then deceased), sold to the defendants Miles H. Hughes and John H. Evans twenty thousand tickets or shares in the said lottery or plan, for which they gave the said Barton the bond and warrant above mentioned.

On the 12th of February, 1808, the governor appointed commissioners to superintend the drawing of the said lottery.

It was argued by Sergeant for the plaintiff, and Levy for the defendant.(a)

Per CURIAM.

Hemphill, President.

The question arising under the above case, is, whether the tickets were sold, agreeably to the act of Assembly passed the 20th of January, 1806. The words of the act are, “ that it shall be lawful for John Biddis to vend his aforesaid “ patent rights, for *eighteen months from the date hereof*; “ according to a plan, to be by him lodged with, and to be “ approved of, by the governor of this commonwealth; he, “ the said John Biddis, giving the necessary sureties for the “ faithful performance in the premises, and for a full and “ complete disclosure and exemplification of his patent rights, “ at the end of the said term of eighteen months; any law to

(a) For the defendant were cited the following authorities, 11 Co. 59 Foster's case Vaughan 179 Hob. 298, Slade against Drake, 4 Dall. Rep. 269- Mitchell against Smith, ibid 298. Maybin against Coulon, 5 John. Rep. 327, Hunt et al. against Knickerbacker.

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“ the contrary of this act notwithstanding.” The question has been argued, upon the supposition, that John Biddis was authorised to vend his patent rights, through the medium of a lottery. This appears to be the true construction of the act, when we take into consideration the preamble, which may be done when the enacting clause is doubtful; the words of the latter part of the preamble are, “ And whereas, it is apprehended, in the present case, that there is danger of incurring the penalty of a law restraining sales, by any mode appearing in the form of a lottery. Therefore, be it enacted, &c.”

If the sale of the tickets, when made, was not authorised by the above act, it is a contract in contravention of the positive law of Pennsylvania, and this court cannot lend its aid to enforce it.

The tickets were sold twenty-three months and eight days after the passing of the act; and the drawing of the lottery did not commence, until after the sale.

This law authorised John Biddis to vend his patent rights, through the medium of a lottery, for a given period; before, and after that period, the sale of tickets, for the purpose of drawing a lottery, was forbidden and unlawful. It was incumbent on John Biddis to have arranged the plan of his lottery in such manner, as to have enabled him to have completed the vending of his patent rights, within the limited time; this was a risk he took upon himself when he accepted of the terms of the act. Has he vended his patent rights within the period allowed by this act? In order to vend his patent rights agreeably to the act, a contract must have been made within the eighteen months. It was insisted, that in order to obtain the end and design of the act, John Biddis ought to be considered as the first purchaser and proprietor of the tickets remaining in his hands, and, as an adventurer in the lottery, had equal right with any second person to make sale of his tickets. If this construction was to prevail, the object of the legislature, in limiting the period to eighteen months, would be entirely defeated. If John Biddis could be considered as the first purchaser of the whole tickets, or, by selling a single ticket, could be considered as the first pur-

chaser of those remaining on hand, there would then be no limitation. By this means he might vend his patent rights, and draw the lottery, at an indefinite period. It does not appear, from the case stated, that any of the tickets were sold *within* eighteen months. Suppose they all remained on hand, at the expiration of that period; could it be said, that he had vend-
ed any of his patent rights? The scheme of the lottery, when approved of by the governor, was the medium through which he intended to vend his patent rights; but cannot, in itself, be considered as a sale. The patent rights remained his property, until he parted with his interest in them, which could not be done after the eighteen months allowed by the act. John Biddis cannot, himself, be considered in the two inconsistent characters, of a seller and a buyer.

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It does not appear, that John Biddis, or his representatives, took any steps to vend his patent rights, until nearly a year after the act had passed; the shortness of the time that remained, was owing to their own neglect.

It is the opinion of the court, that the consideration for which the bond in this case was given, is unlawful; and, that under the plea of payment, judgment ought to be entered for the defendant.

Judgment for the defendant.

BAINBRIDGE and another against ALDERSON and Company.

1811.

ON motion of *Binney*, a rule was obtained to shew cause, why the foreign attachment issued in the above case should not be dissolved.

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A foreign attachment cannot, legally, be issued against the effects of a person while he is present, dwelling in the county where the writ is issued.

The plaintiffs were merchants, lately trading, at Liverpool, under the firm of "Bainbridge and Cartwright." The defendants were also merchants, lately carrying on trade, at London, under the firm of "John Alderson and Company." Both plaintiffs and defendants were subjects of Great Britain.

1811. **John Alderson**, one of the firm of **John Alderson and Company**, arrived in the city of Philadelphia, from England, on the first day of October, one thousand eight hundred and seven; and, shortly afterwards, commenced business, under the firm of "**Alderson and Rowlandson.**" On the twenty-sixth day of November, in the same year, he returned to England; came to Philadelphia in April, eighteen hundred and eight; returned to England in November following; came to Philadelphia in the beginning of the year eighteen hundred and nine; returned to England in November of that year, and came to Philadelphia on the ninth day of September, one thousand eight hundred and ten, where he constantly remained ever since; except between the twenty-fourth day of November, one thousand eight hundred and ten, and the ninth day of January, one thousand eight hundred and eleven, when he was absent, on business, at Charleston. The counting house of **Alderson and Rowlandson**, in the city of Philadelphia, continued open, from the first of May, one thousand eight hundred and nine, until the month of March, one thousand eight hundred and eleven; and the business of that firm, here, was exclusively under the direction of **John Alderson**, since November, one thousand eight hundred and ten; at which time **Rowlandson** went to England. **John Alderson** had a family, and, from the time of his last arrival from England, kept house in or near Philadelphia: he had been heard to say, that he had no intention of becoming a citizen of the United States, but expected to return again to England.

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Binney contended, that the rule must be made absolute, for two reasons.

First. Because the defendant, **John Alderson**, was such an *inhabitant* of Pennsylvania, as not to be the object of a foreign attachment. And,

Secondly. Because the foreign attachment had illegally issued against the effects of the defendants, while one of them was personally present.

The twelfth section of the Act of Assembly of Pennsylvania of the second of March, 1723, provides, that a foreign attachment shall issue against the goods of any one *not an inha-*

bitant. In the case of Lazarus Barnet, (a) president Shippen informs us what is the meaning of the word “inhabitant.” He says, “a person coming hither occasionally, as a captain of a ship, in the course of trade, cannot be called an inhabitant; nor does a person going from his settled habitation here, on occasional business to *Boston*, or any other place, cease to be an inhabitant. But a man who comes from another place to reside among us, introduces his family here, takes a house, engages in trade, contracts debts, and after some time, runs away with design to defraud his creditors, he ought surely to be considered such an inhabitant as *not* to be an object of the *foreign attachment*, &c.” 1811.

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In the case of Taylor against Knox, (b) the court seemed unwilling to lay down any general rule as to what will, or will not make a person an inhabitant; but they thought it ought to be such a *residence*, as would give him the rights of citizenship, to wit, for twelve months.

On the second point, he said, that according to the custom of London, there must be a return of *nihil*, on which to ground a foreign attachment.

In the case of M'Clenachan against M'Carty, (c) it is said, that the attachment law supposes the defendant to be an *absent person*. He also cited, and relied on the case of Lyle against Foreman, (d) as decisive on this point.

A foreign attachment is only a process to compel an appearance, (e) which, in this case, may be done by a *capias*.

Randall and *Rush* contra, argued, that *resident* and “*inhabitant*” were used by the legislature, the Bench and the authors of Dictionaries, as synonymous terms; and had been defined to be, “a person coming into a place with an intention to establish his domicile or permanent residence; and, in consequence actually resides.” (f) The defendant came within that description of persons included, by President Shippen, in La-

(a) 1 Dall. Rep. 152.

(b) 1 Dall. Rep. 158.

(c) 1 Dall. Rep. 375.

(d) 1 Dall. Rep. 480.

(e) Law of Attachments, 6.

(f) 2 Peters Admi. Dec. 450. Johnson's Dictionary.

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zarus Barnet's case, under the second division of the first head, namely, those whose *actual* residence was abroad. In considering the question of domicile, the *time* is not essential; the question turns entirely on the *intent, executed*. That notwithstanding the presence of John Alderson *here*, he did not cease to be an inhabitant of *London*, as he intended to return; but to say that a person was an inhabitant of two places, at the same time, was a solecism in law. In the case of Lazarus Barnet, the question arose, between the creditors who had issued foreign attachments and who claimed the funds for their *exclusive* benefit; and those who claimed under a domestic attachment, which was for the benefit of *all* the defendant's creditors; here, the dispute lay simply between the defendant and his creditors. When judge Shippen says, in *Lyle against Foreman*, that while a man remains in the State though avowing an intention to withdraw from it, he must be considered as an *inhabitant*, he must be understood to mean, such an inhabitant, as would be an object of the *domestic attachment*.

PER CURIAM.

Hemphill, President.

In this case, two questions have been made:

1st. Was the defendant, John Alderson, such an inhabitant, as not to be an object of the foreign attachment? and,

2ndly. Could a foreign attachment be legally issued against him, while he was actually on the spot? The court do not deem it necessary to decide upon the first question, as it is clearly their opinion, that the attachment cannot be supported on the second ground. In the third section of the act of one thousand seven hundred and five, it is provided, "that
" no writ of attachment shall hereafter be granted against
" any person or person's effects, but such only as *at the time*
" of granting such writs are not resident or residing within
" this province, &c." The defendant certainly was residing here at the time the attachment was granted. Whether he had been here long enough to become, exclusively, an object of the domestic attachment, cannot be material; for he was here

to answer the design of the act, which was to obtain bail to the plaintiff's action. He cannot be required to give any other bail on the attachment, than if he had been arrested on a *capias*; in neither case could he be compelled to give bail for his partners, who are not named in the writ.

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In the case of Lyle against Foreman, (*f*) this question seems to have been decided. That was a case of foreign attachment, to Dec. Term, seventeen hundred and eighty nine; it was proved, that on the 5th of December, the defendant was at Lancaster, on his way to Fort Pitt, whence he intended to proceed to the Spanish settlements, below the Natches, on the Mississippi, but was actually at Fort Pitt, on the second day of January, seventeen hundred and ninety. President Shippen observed, that while a man remained in the State, though avowing an intention to withdraw from it, he must be considered as an *inhabitant*, and therefore, not an object of the foreign attachment. It was urged, that judge Shippen, in making use of the word *inhabitant*, meant, such an inhabitant as would be an object of the domestic attachment; but I think that could not have been his meaning; for, if the defendant had been such an inhabitant as rendered him exclusively an object of the domestic attachment, there would have been no necessity for enquiring into the fact, whether or not he was in the State at the time the attachment issued; for, in that case, the foreign attachment could, on no principle, have been supported.

We do not decide, that a foreigner, casually travelling, unknown to the plaintiff, through a remote part of the State, would be protected from a foreign attachment. In this case the defendant was dwelling in the county when the writ issued, and had been so dwelling, for a considerable time before.

Let the rule be made absolute.

Rule to shew cause why the attachment should not be dissolved, absolute.

(*f*) 1 Dall. rep. 480.

1811.

September 26.

MUSSI *against* LORAIN the younger.

A gave the firm of *B* and Company his note, payable in blank; *B* gave the note to a broker, to sell, who filled up the blank with the name of a fictitious person, indorsed the same name on the note, and passed it away to *C*, in exchange for land; assuring *C* that the fictitious payee had given a valuable consideration for the note; before the note came to maturity, *A* failed. The court held, 1st. that *C*, the plaintiff, could not recover on a special count charging *B* with indorsing the note, in the name of the fictitious payee.

2ndly. That the plaintiff might recover on a count for money had and received.

3dly. That if the Jury believed there had been a fraud practised, the statute of limitations began to operate only from the time of its discovery

WILLIAM HOLDERNESS, on the 9th day of July 1801, being indebted to the firm of John Lorain and son, in the sum of four hundred and fifty three dollars and sixty-seven cents, gave them his negotiable note, at thirty days, for that amount; payable, *in blank*. John Lorain the younger, the defendant, one of the firm, placed this note in the hands of Ross, a broker. Ross filled up the blank with the name of "*James Davis, junior*," a fictitious person; indorsed the name of "*James Davis, junior*," on the back of the note, and afterwards passed it away to the plaintiff, Mussi, in exchange for land. At the time Mussi received the note, Ross assured him, that James Davis, junior, had given cash and dry goods for it. Before the note came to maturity Holderness failed. The note was protested, for non-payment.

On the eighth day of August, 1807, Mussi applied to John Lorain, junior, for payment. Lorain at first declared that he knew nothing of the note, but he afterwards admitted, that he had put it into the hands of Ross, and said, that it was then in blank; that he knew nothing of James Davis, junior, but believed he was a fictitious person; that he had taken care not to put his own name on it, and was not responsible.

The declaration, besides a count for money had and received, contained a special count, wherein the defendant was charged with having indorsed the note by the name of James Davis, junior: the pleas were *non assumpsit* and payment and the statute of limitations.

Milnor, for the defendant, contended, that Lorain had placed the note in the hands of the broker to be sold without intending to become responsible; that Mussi received the note with a full knowledge of the facts, and therefore could not recover. That the action should have been, on the case, for a deceit, and should have been brought against Ross: that at all events, it could not be maintained against John Lorain, junior, alone, for it had appeared that the note was the property of the firm. He also relied on the plea of the statute of limitations as a bar to the plaintiff's action.

Browne, for the defendant, insisted that *Lorain*, by his agent, *Ross*, had practised a fraud upon *Mussi*; that *Ross* had represented *James Davis junior*, as being a real person, possessed of funds; and the transaction as being real. That owing to these false representations, *Mussi* must have taken the note, partly upon the supposed credit of the indorser.

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That for every wrong the law had provided a corresponding remedy, therefore, the plaintiff was entitled to recover, provided the form of his action was correct and he had directed it against the proper person,

That the action for money had and received, lay to recover back money paid under a deceit. (a)

That the action was brought against the proper person; it would not lie against *Ross*, who was merely agent, nor against the firm of *Lorain & Son*, for it did not appear that the father had had any participation in the transaction.

To the plea of the statute of limitations he replied, that this action arose out of a fraud, in which case the statute is no bar. (b)

PER CURIAM.

Hemphill, president,

To the Jury, (after stating the case,)

This case is novel in its nature, and presents several important objects of consideration.

It is contended, by the counsel for the defendant, that *Lorain* authorised *Ross* to sell the note for the best price that could be procured, intending, that the purchaser might fill up the blank with his own name; and that the plaintiff received the note with a full knowledge of the circumstances. If you think this can be fairly presumed from the evidence, you ought to find for the defendant. If, on the other hand, you shall be of opinion, that *Mussi* was innocent and ignorant of

(a) 1. Salk. Rep, 22. Tomkins against Bernet 2d Wm. Black. Rep. 824. Farmer against Arundal.

(b) 3d. Piere Williams's Rep. 143. South Sea Company against Wymondsell. vide also 2d Doug. 654, 656. Bree against Holbech.

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the transaction, and that he believed that *James Davis, junior*, was a real person, then the case will bear a very different complexion; for then Mussi was deceived, and necessarily sustained an injury.

Whenever a person has sustained an injury, there must be a remedy; the next question, therefore, that will present itself, is, what remedy has the law provided in such a case?

If *A*, to raise money, draws a bill of exchange on *B*, in favour of a fictitious person, and *B*, knowing the fact, accepts the bill; and it is afterwards indorsed in the name of the fictitious payee, and comes to the possession of an innocent person, the acceptor is liable, and it may be recovered against him; either as a bill payable to the bearer, or as a bill payable to the order of the drawer; for the names of the drawer and acceptor appear upon the instrument and give it a currency; and the fictitious indorsement is considered as a nullity.

Agreeably to these principles, we think, that Holderness would have been liable: by his signature, he gave currency to the note, and by passing it away in blank, he authorised the name of the holder to be inserted. But we know of no law by which an action can be maintained against a person, as a party to a negotiable instrument, when his name does not appear upon the paper; we therefore think, that the present action cannot be supported on the special count laid in the declaration. It might also be added, that it is an invariable rule, that no recovery can be had on a *special count*, unless it is proved, as laid, which we think has not been done in this instance. It is stated in the declaration, that the note was indorsed by John Lorain, junior, by the name of *James Davis, junior*, of which there was no evidence. Again, the note was the property of *Lorain and Son*, and if it can be recovered on the ground of an *indorsement*, the action should have been against that firm. It is alleged by the plaintiff's counsel, that a fraud was committed by John Lorain, junior, in which his father never participated; if you believe this to have been the case, an action will lie against John Lorain, junior, though not in the form stated in the *special count*.

Can the action be supported on the count for money had

and received? This is a liberal count and is said to lie in every case where the defendant has received money, which, in equity and good conscience, he ought not to retain.

It lies to recover back money paid through the *deceit* of the other party (a) : but this form of action confirms the act of the defendant so far, that the *right to receive* cannot be gainsaid; no more therefore can be recovered than the amount *actually received*.(b)

Has Lorain received money, which in equity and good conscience he ought to refund? An answer to this question will involve the following considerations; whether Lorain authorised the name of James Davis to be inserted in the note,—whether Mussi believed James Davis, junior, to be a real person,—and what credit Mussi gave to the indorsement.

Another ground of defence taken by the defendant, is the *statute of limitations*; to which the plaintiff replies “that there has been fraud.”

The statute begins to operate from the time the right of action occurs, and where there is fraud *from the time of its discovery*.(c)

You will therefore inquire whether fraud has been *proved*; and if there was fraud, when it was discovered by the plaintiff.

The jury found a verdict for the plaintiff for the amount claimed.

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The cases of FREDERICK PIPER, Esquire, *et al.*

1811.

September 30.

SEVERAL of the jurors, summoned to attend at this term, made application to be excused from serving on account of the situations and offices which they held; the court *de-* situation of a public nature, and who has no power to act by deputy; *contra* if the trust is of a private nature, or the party, has the power to act by deputy. The court will excuse a person from serving as a juror, who holds a

(a) 1 Salk. Rep. 22.

(b) 1 Dall. Rep. 222.

(c) 1 Smith Ed. of the Laws of Penn. 80 Note L

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Frederick Pi-
per, Esq. et. al.

clared, that whenever the office or situation was of a public nature, and the holder had no power to act by deputy, he was entitled to be excused from serving as a juror; but it was otherwise where the trust was of a private nature, or the party had the power to act by deputy.

In conformity to this rule, they excused Frederick Piper, esquire, inspector of bark; and they refused to excuse William Simmons, weigh-master,

1811.

LAWRENCE against BURNS.

October 5.

Issue was joined on the pleas of *non assumpsit* and payment and notice of set-off: when the jury had agreed on their verdict, the prothonotary called the plaintiff, who answered; the jury found for the defendant, but having neglected to calculate the interest, they retired again to make the calculation; when they returned, the plaintiff insisted on suffering a *non suit*, but the court held, that the defendant had the right to take the verdict.

EDWARD LAWRENCE brought an action of *indebitatus assumpsit* against Nicholas Burns, to which the defendant pleaded, “*non assumpsit* and payment, and gave notice of a set off.”

After the evidence was closed, the jury retired to consider of their verdict; when they returned, the prothonotary called the plaintiff, who answered; the jury being asked for whom they found, replied “for the defendant:” the prothonotary recorded the verdict for the defendant. The foreman of the jury, addressing the prothonotary, inquired, if he did not mean to take the sum, and added, that they found the sum of one hundred and fifteen dollars, with interest since the day the suit was brought. The court informed the jury, that the verdict could not be recorded in that form, and desired them to calculate the interest. The jury retired; when they returned, the prothonotary called the plaintiff again, who refused to answer, but insisted on suffering a *non suit*. The sum was recorded.

The plaintiff, by J. R. Hopkins, now moved for a rule to shew cause why the verdict should not be set aside, and a *non suit* entered.

He contended, that there could be but one verdict in a cause, which formed an *entire* entry on the record; that if the

first entry by the prothonotary was the verdict of the jury, the subsequent entry was unauthorised and void; but if, as he conceived was the better opinion, the first entry was not the verdict, then the jury had the right to change their minds, and the plaintiff was at liberty to receive the verdict, or suffer a *non suit*.

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For the defendant, it was answered, by *Browne*,

First. That the plaintiff had made his election to answer, after which, the court would not permit him to withdraw; that it was true, that the law placed it at the option of the plaintiff to answer, or suffer a *non suit*; but the privilege was not favoured; for, in one case, where it had been contemplated by the plaintiff's counsel to suffer a *non suit*, but the plaintiff, being called, answered by mistake, the court, ordered the verdict to be recorded. That the two entries made by the prothonotary, formed but one verdict, and that accident alone had prevented them from being made at the same time. But;

Secondly. He contended, that the verdict in this case was taken under the peculiar provisions of the defalcation act,(a) which seemed to contemplate a division in the verdict, such as had taken place. After stating what shall be the proceedings, in case there is a balance due to the plaintiff, the act proceeds "But if it appear to the jury, that the plaintiff
" is overpaid, then they shall give in their verdict for the de-
" fendant; and withal certify to the court, how much they
" find the plaintiff to be indebted, or in arrear, to the defend-
" ant, more than will answer the debt or sum demanded."

In conformity to the provisions of this law, the jury had first given their verdict for the defendant, and afterwards, " had certified to the court how much they found the plain-
" tiff to be indebted to the defendant, more than would answer
" the sum demanded." That, from the whole tenor of the act, it was evident, that the legislature did not intend to allow the plaintiff to suffer a *non suit*; from the time issue is joined, on the set-off, the defendant becomes an actor, like a defendant in replevin, who avows for rent; and the words of the law are, " the jury shall find for the defendant:" and again, " the
" sum or sums so certified, (for the defendant) shall be re-

(a) 1 Vol. Bioren's ed. L. P. 61.

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“ corded with the verdict, and *shall* be a debt of record;” that any other construction would render the act, as far as respected the persons claiming the set-off, entirely useless.

The court refused to grant the rule, declaring, that they thought the defendant had the right to take the verdict.

Rule, to shew cause why the verdict should not be set aside, and a non suit entered, refused.

REDWOOD, et. al. *against* CONSEQUA.

1811.

October 21.
It is no cause to dissolve a foreign attachment, that it has issued against a person who never has been within the limits of the State of Pennsylvania; nor that the claim is for *unliquidated damages*, for the non performance of a contract.

A FOREIGN attachment issued in this case, in which, bail was demanded in fifty thousand dollars.

On motion of *C. J. Ingersoll*, the court granted a rule on the plaintiffs to shew their cause of action, and why the attachment should not be dissolved.

Chauncey, for the plaintiffs, produced the following affidavit.

“ Joseph S. Lewis, of the city of Philadelphia, merchant,
“ one of the plaintiffs above named, being duly affirmed according to law, saith, that the defendant is justly and truly indebted to the plaintiffs in the sum of thirty thousand dollars, and upwards, besides interest, upon a promise made by the defendant, for a valuable consideration, to deliver to the plaintiffs a large quantity of teas, of a certain quality, which promise he has not complied with, but has broken: The affirmant further saith that the defendant is not an inhabitant of the state of Pennsylvania, and was not an inhabitant of said state, at the time of the issuing of the attachment in this cause; and that the said defendant was not then, and has not been, at any time since, within the state of Pennsylvania.”

For the defendant it was contended by *C. J. Ingersoll* and *Dallas*, that the attachment must be dissolved.

First. Because it had issued against the effects of a person, who had never been within the limits of the state of Pennsylvania. 1811.

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Secondly. Because the cause of action was *unliquidated damages*, for which no foreign attachment will lie.

Thirdly. Because the plaintiffs' affidavit was not drawn with that precision the law requires.

On the first question it was observed, that the custom of London, and our acts of assembly, were equally explicit. As to the custom of London, several cases were cited, and relied on.(a)

With respect to the act of assembly of 1705,(b) they contended, that it was plain the legislature contemplated the proceeding by foreign attachment, only where the defendant had been present within this state. For, the preamble gives as a reason for the law, that "the effects of persons *absenting* are "not equally liable with those of persons dwelling on the "spot," which can only include such as were once present. And not only so, but it must be for "debts contracted or owing *within this province.*" And there was good reason for limiting it to such: for, with regard to a person who *absented* or *absconded* from the province, after contracting debts, the proceeding by foreign attachment was a measure no less just than wise; but the effect would be quite different, if the court extended the provisions of the acts, so as to embrace the case of a person, who never had been within this commonwealth; one, who had never, directly, or indirectly, made any contract here; and who resided at such an immense distance, that before he could receive notice of the proceedings against that portion of his property, which had accidentally fallen within the jurisdiction of our courts, he might be condemned, his property sold, and the time expired within which he could have an opportunity of dissolving the attachment and making defence. In the case of Fisher against Lane,(c) the court mentions, with horror, the idea of condemning a person *unheard*, as contrary to the first principles of justice; yet, such

(a) Lev. Rep. 23. Lutwich 984, and Shower's Rep. 10.

(b) 1 Vol. Smith's edition of the Laws of Pennsylvania, 45.

(c) 3 Wil. 302, 303.

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would be the case in the present instance, if the attachment was supported. In the beginning of the eighteenth century, we had a thin, colonial population; its external commerce passed through British channels, and was confined to British ports; the legislature, at that time, did not contemplate debts contracted in China, and other distant places, with whose inhabitants we had then no trade or intercourse. At that period an act was passed, which is now obsolete, but which may be found in Galloway's edition of the laws, (a) providing, that no one should leave the province, until he had put up, in public places, notice of his intention to depart. Immediately after this law, followed the first attachment act, which evidently was intended, to provide a remedy against the property of those, who being indebted, should withdraw from the province, without giving the public notice. The first act is a cotemperoneous, legislative construction of the attachment law, of a most decided character.

Secondly. They insisted, that the cause of action was *unliquidated damages*, for which no foreign attachment will lie. Here again, the custom of London, and the acts of assembly were in perfect uniformity.

That no foreign attachment could issue, under the custom of London, except in cases of *debt*, was abundantly proved by authorities, (b) and was admitted by the court, in Fisher against Consequa, the case on which their opponents placed their chief reliance. (c)

What, they asked, were the words of the act of assembly of 1705? "*debts contracted or owing.*" There are three classes of cases, that will explain the meaning of the word "*debt.*"

1st. Cases arising under the bankrupt law.

2ndly. Decisions upon the English statutes of set-off, and,

3dly. Cases arising under the defalcation act of Pennsylvania.

On each of these three heads, they amplified, and endeavoured to shew, that the word "*debt*" was understood in the sense for which they contended.

Under the first class they cited the case of Duser against

(a) Page 43.

(b) Vide Law of Attachment, 43:

(c) Vide Appendix, page 28.

Murgatroyd. The defendants had been discharged, under the bankrupt law of the United States, from all debts, claims and demands; Dunsar afterwards brought a suit against them, for damages, for sinking a vessel at the wharf, by negligence, in stowing the lumber port; they pleaded their discharge, but, it was held to be no bar to the recovery. Shoemaker against Keely, (a) and Bugan against West, (b) were also read and relied on.

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Why should a bankrupt's estate be impregnable to a claim of unliquidated damages? Because it would have to be taken on the party's own estimate. The same reason applies to foreign attachments.

Under the third head, they relied on the case of *Kachlin et al.* against *Mulhallen et al.* (c) where the court admitted, that our act of assembly for defalcation, which speaks of two or more being *indebted* to each other, extends further than the English statutes of set-off; yet they refused to allow the defendant, in an action on a bond, to give in evidence, that the bond was given for payment of the consideration money of a tract of land and a mill, which the plaintiffs had sold to the defendants, reserving, in the deed, the right to swell and raise the water, so as not to injure the mill; but, that the plaintiffs had raised the water, so as to injure the mill.

They mentioned also the case of *Gordon survivor, &c.* against *W. Bowne*, (d) which was an action of assumpsit on an open policy of insurance, where the plaintiff declared for a total loss, and the defendants claimed to set-off a note. KENT, chief justice, in delivering the opinion of the court, said, that the demand of the plaintiffs as well as that of the defendants must be *specific* and *certain*; there must be mutually, or on each side, a *debt* to authorise a set-off: and he cites the case of *Howlet* against *Strickland*, (e) where it was held, that *uncertain damages* could not be set-off.

Take the words of the law together, "debts contracted "or owing," says the act; but did any lawyer ever read, or

(a) 2 Dallas Rep. 213.
(c) 2 Dall. Rep. 237.
(e) Cowper 56.

(b) 1 Binney 263.
(d) 2 Johnson's Rep. 150.

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hear of "*damages contracted*," or "*damages owing*?" It was a perversion of terms.

Thirdly, The plaintiff's affidavit is not drawn with that precision which the law requires.

In Pennsylvania, in order to sustain a foreign attachment, there must be a positive affidavit of a real subsisting debt. The present affidavit is indirect and argumentative, and concludes in *damages*. It does not contain a sufficient statement of the facts; no time or place is mentioned; nor does it state whether the alleged agreement was in writing, or by parol. What is the breach complained of? Is it a non-delivery? if so, is it in whole, or in part? Or, is it the *quality* that is insufficient? No satisfactory answers to these questions can be fairly drawn from the affidavit. No prosecution for perjury can be founded on it, if the facts are untrue.

For the plaintiff, it was contended, that a foreign attachment lies in all cases of *contract* whether *written*, or by *parol*; and whether sounding in *debt* or *damages*.

To discover what was the mischief contemplated by the attachment law, recurrence was had to the whole spirit and intent of the preamble and act of 1705, as well as subsequent laws on the subject of attachments. It was observed, that the framers of those laws were familiar with the system of jurisprudence in England; in which country, two remedies may be had against an absent debtor; one, a local remedy by attachment against his effects, under the custom of London and other towns; the other, at common law, by prosecuting his person to *outlawry*. In Pennsylvania there is no process of outlawry, in civil cases. In framing the attachment law, the legislature, no doubt, had the custom of London in their view, but they enlarged the remedy to meet the existing evils. At that time, contracts in Pennsylvania were generally parol; and, ever since the passing of that law, the practice has been to issue foreign attachments *in case*; for this assertion there was the highest authority.(a)

It was evident, from the whole of this law, that it did not mean to confine the remedy by attachment to cases of *debt*, technically considered; the word *debt*, used in the fourth section

(a) 1 Dall. Rep. 375, M'Clenachan et al. against M'Carty.

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referred to the judgment recovered against the original defendant, which recovery makes it a debt, in the strict sense of the word, though originally sounding in damages. But granting, for the sake of argument, that the act contemplated only the cases of *debt*, as understood in our law books, it was not so clear that the attachment in this case must be dissolved. In the case of *Frazer against Tunis*(a), an endeavour was made to confine the meaning of the word *debt*, as used in the act of the 19th of April, 1794, to narrower grounds than those arising under an action of covenant; but the chief justice, in delivering the opinion of the court, says, there is no doubt but the word *debt* is frequently understood as a sum of money reduced to a certainty, and distinguished from a claim for uncertain damages; and in this sense it has been taken in the construction of the British statutes authorising a set-off, where there are mutual debts between plaintiff and defendant. But the question is, whether it has not been used in a more extensive sense; and, if so, whether it will not best answer the intent of the act of assembly, to construe it in its most enlarged signification. *Debt* lies on a *quantum valebat*(b).

In the subsequent act of assembly the legislature enlarge instead of diminishing the right of action; the words are, “debt, claim, or other demand.”

Jolly against Barber,(c) was a case of tort. Warder had remitted some money to Sansom in London; Barber, having a claim against Warder, went to London and attached Warder's funds in Sansom's hands; prior to the attachment being laid, Warder had assigned the effects to Jolly; judgment was obtained in London; Jolly then attached the effects of Barber here: the three points made were,

First, Whether the plaintiff should not produce the records of the proceedings in London;

Secondly, Whether these proceedings could be overhauled in this collateral proceeding; and,

Thirdly, Whether a foreign attachment would lay in the case of a *tort*.

(a) 1 Bin. Rep. 254.
 (c) Not reported.

(b) Fortescue's Reports 197.

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The decision went merely on the first point; that the plaintiff ought to have produced the record.

In Taylor against Knox(a), president Shippen appears to have considered, that less evidence of a cause of action is necessary in a foreign attachment than in case of a *capias*; a distinction that is well founded, because, if the foreign attachment is quashed, there is an end to the remedy; but it is not so in case of a *capias*. The same principles are recognized in the case of Doane against Penhallow(b).

As to analogous instances, it was observed, that arguments from analogy are cogent, when drawn from statutes in *pari materia*, or from the common law; but when a mere independent statutory system is introduced, such arguments rarely apply.

The English statutes respecting the set-off of mutual debts had been mentioned. Prior to the second year of George the second, the only remedy of a defendant having a claim against a plaintiff, was a bill in equity. To remedy this inconvenience, the statute of set-off was introduced. The decisions of the British judges restraining set-offs to mutual debts, are not recognized in Pennsylvania. Our defalcation act occupies a more extensive ground, comprising almost every case. The purpose in the cases referred to, was, not to ascertain what constituted a debt, but what constituted such a debt as could be the object of a set-off. As to Shoemaker against Keely(c), it was widely different from the present; it was case, in deceit; and the objection made, was, that the form of action precluded the operation of a set-off; it was not an action of assumpsit on a warranty, but was for a *tort*. In a note to Williamson against Allison(d) the cases are collected; and the distinction between an assumpsit on a warranty, and case in deceit, is explained. With this distinction, we can easily understand the case of Shoemaker against Keely. The case of Rugan against West(e) is of a peculiar nature, in which the bankrupt himself had no right of action whatever. That case does not

(a) 1 Dall. 158.
(c) 2 Dall. Rep. 213.
(e) 1 Bin. Rep. 263.

(b) 1 Dall. Rep. 218.
(d) 2 East 448.

resemble the present; the mere form of the action settled the question which arose incidentally on the evidence. Mr. Justice Yeates confined his opinion to the nature of the action, and did not consider the question of contract.

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Dusar against Murgatroyd, was an action brought for a gross negligence; it was a *tort*.

No reference to the bankrupt law could avail, unless it was shewn, that a case of *assumpsit* was not considered as a *debt*, proveable under the commission.

That the cause of action must be stated to have arisen in London, is probably true; but in the case of Warder against Barber, the debt arose in Liverpool and the attachment was in London, yet no objection, on that ground, was taken. The act of assembly of Pennsylvania has extended the remedy to all debts; the words of the preamble are "contracted or owing:" the debt in this case is owing *here*, because the creditor lives in Pennsylvania. Debts arising on general contracts are not local; but are to be considered as following the person of the creditor, and owing wherever he is to be found. Even if the place must appear, it need not be stated in the affidavit. In the law of attachments(*a*) there is the form of an affidavit in a foreign attachment, according to the custom of London, in which it is not averred that the debt was contracted within the jurisdiction of the mayor's court.

Lastly, In the case of Fisher against Consequa, (*b*) the question whether a foreign attachment would lie in a case like the present, came, judicially, before the circuit court of the United States; and after full argument, a decision was had in *our* favour.

PER CURIAM.

Hemphill, President.

In this case, two principal questions have arisen under the act of assembly, passed in 1705, and the several supplements thereto.

(a) Page 237.

(b) Appendix, page 28.

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against
GONZALES.

First, Can a foreign attachment issue against a person, who never has been within the limits of the state of Pennsylvania.

Secondly, Is the cause of action, stated in the affidavit read in this case, sufficient to support a foreign attachment.

In consequence of the very great reliance which, in the course of the discussion, was placed upon the preamble of the act of 1705, the court have considered that part of the subject with much attention. In the first place it will not be irrelevant to observe, what every person conversant in legislative proceedings must know, that the preamble is not always a safe key to the construction of the enacting clauses. The preamble sometimes conforms with some degree of precision to the original provisions of the bill; but the bill, almost invariably undergoes amendments, by which the remedy is often enlarged, so as to embrace a greater mischief than the particular one that gave rise to the act; and, if the preamble does not become totally inconsistent with the enacting clauses, it is seldom changed: indeed, the preamble is never considered with strict legislative attention, to see if it exactly corresponds with the body of the act. Hence, perhaps, the rule may have arisen, that the preamble is not to be called in aid of the construction, unless where the enacting words are doubtful and ambiguous.

It is said, (a) that the preamble of a statute is no more than a recital of *some* inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute; and, (b) that the general enacting words of a statute are not to be restrained by any words, introductory to the enacting words.

In the case of *Kirk against Dean*, (c) the sentiments of the judges of the supreme court, in relation to the preamble and enacting clauses of an act of assembly, are not inapplicable to the present case.

The expressions of the chief justice are: "Should it be granted then that the preamble of the second section does not extend to dower, still the enacting part comprehends it, and that is sufficient; the preamble ought not to controul

(a) 6 Bac. Abr. 381.

(b) Ibid.

(c) 2 Binney 341.

“ the enacting part of a statute, without very strong reasons.”

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Judge Yeates lays down the general rule thus: “ It was agreed by the judges of the king’s bench, that though the preamble cannot control the enacting parts of the statute, which is expressed in clear and unambiguous terms, yet, if any doubt arises on the words of the enacting part, the preamble may be resorted to, to explain it.

“ Judge Brackenridge has enlarged more fully on the subject.

“ Few general laws (he says) are enacted, to which particular cases have not given rise; and although it is a sound construction of the decision of a court, to confine it to the case under adjudication, yet the preamble of a law has never been considered, as restraining the enacting words of the law, to the particular case recited in the preamble, upon the ground of its having attracted the attention of the legislature in making the law. The courts of law taking the preamble into view, have restrained or enlarged by it, according to their ideas of the policy of the enacting part; and they cannot do otherwise, because it is the only principle by which they can undertake to *determine*, where the terms are liable to different constructions, what the legislature intended to embrace. It is no uncommon thing, for the general remedy to be intended to overleap the particular mischief: for where there is the same mischief, there is the same reason for the remedy; and in the case of a remedial law the construction is to be liberal.”

In the case of the bank of North America against Fitzsimmons,^(a) the preamble of the act is confined to purchasers; but the words of the enacting clause are broad enough to embrace judgment creditors, and it was determined that the preamble should not restrain the generality of the enacting part of the act. In this case, chief justice Tilghman says: “ that, as to the construction of statutes, it is certain they are not always to be construed according to the *letter*, and that general expressions may be restrained, *where it clearly appears from the whole law*, that it was the intention of the

(a) 3 Binney 356.

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“ legislature to provide a remedy only for particular cases.”

In another part, (a) he observes, “ that nothing can be more
“ general or more plain, than the expressions in these sec-
“ tions.” No judgment shall “ continue a lien on real estate
“ during a longer term than five years, unless revived by
“ scire facias;” why then are these “ general words to be re-
“ stricted to the case of *purchasers*? Because, it is answered,
“ the preamble makes no mention of inconveniences to any
“ but purchasers.” “ I am not satisfied with this reason; the
“ intention must be clear, to authorize the restraining of the
“ enacting clauses. I cannot say that the intent is clear, when
“ I find the title more comprehensive than the preamble; and
“ when we all know that nothing is more common than to
“ recite a particular mischief, and to provide remedies for
“ other *mischiefs*.”

The words of the third section of the act of 1705, are,
“ provided that no writ of attachment shall hereafter be
“ granted against any person or person’s effects, but such
“ only, as, at the time of granting such *writs*, are not resi-
“ dent or residing within the province.” In the fourth sec-
tion the words used are “ *non residents*.”

In the act of the second of March, 1723, the words are,
“ not inhabitants,” and why shall the generality of these words
be restrained? They are certainly clear and unambiguous, and
much broader than the particular words in the preamble; and
they do not lead to any absurd or unjust consequences. If
the legislature, in the enacting part, had intended to have re-
stricted the granting of foreign attachments, to the particular
mischief recited in the preamble, would they not have ex-
pressed themselves differently? Would they not have said, that
writs shall not be granted against any person or person’s effects,
but such only as at the time of granting the attachment had
absented or absconded. In the case of a domestic attachment
they used these particular words. “ Be it enacted that if any
“ person shall *absent* him or herself, out of this government,
“ or abscond, &c.” No good reason has been assigned to in-
duce the court to depart from the generality of the words used
by the legislature in the enacting clauses: besides, we have

not heard that this point has ever before been questioned, although the act has been in operation for upwards of one hundred years: and in addition to this, the act under discussion has received a judicial interpretation by the judges of the supreme court.

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In *Lazarus Barnet's case*, (a) judge Shippen, speaking of the first act, says, "that within its provisions, three sorts of debtors were included. 1st. Those who never resided *here*, or *whose actual residence was abroad*. 2ndly. Those who had resided *here*, and had absconded or otherwise removed, both of which are comprised in the general description of *non residents*; and 3dly. Those who were still *here*, but about to remove without giving security to *their creditors*. In the case of *M'Carty against Emlen*, (b) chief justice M'Kean, in assigning his reasons why a debt in suit can be attached, although it be not attachable in England, says, "If justice and reason are *not* opposed to it, public policy and convenience strongly recommend it: many *foreigners resident abroad*, enjoy an extensive credit from one class of citizens in this country, on account of the debts which are known to be due to them from another class; and if nothing more were necessary to shelter such foreigners from the effects of an attachment, than to bring suits against their debtors, it is obvious, that the fund which constitutes the principal security of the American trader, might be easily and irretrievably withdrawn." Judge Yeates (c) says, "that the intention of the act would be easily frustrated, if every foreigner, by instituting a suit, could furnish a bar to the attachment: our courts would, in effect, be still open to non-residents, but shut against their creditors." It cannot be believed, that these Judges bore in their minds a tacit qualification, that the foreigners of whom they spoke must at some period have been in this state.

From these authorities it is evident, that a foreign attachment will lie against a person who has never been within the limits of the state of Pennsylvania: and this construction appears to the court, not only to be within the letter, but

(a) 1 Dallas 152.

(b) 2 Dallas 277.

(c) In page 279.

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within the spirit and meaning of the acts; and not only agreeably to the uniform practice, but consistent with judicial recognition from time to time.

As to the second question, what cause of action is sufficient to support a foreign attachment.

The preamble of the act of seventeen hundred and five, speaks of *debts* generally; the first section which authorises Justices to grant writs of attachment, is silent as to the cause of action; so also is the second section of the act.

The third section contains the words "*debt or demand*," but in a manner that leaves it doubtful, whether the word *demand* applies to a person not residing within the province. The words are "provided always that no writ of attachment shall hereafter be granted against any person or persons' effects but such only as, at the time of granting such writs, are not residents or residing within this province, or are about to remove or make their escape out of the same, and shall refuse to give sufficient security to the complainant for his *debt or other demand* before he depart the said province." By a strict and grammatical construction, the word *demand* would be confined to residents about to abscond, yet it is very questionable whether the legislature had not this word in their contemplation, throughout the section; as a reason cannot be given why the cause of action in both cases should not be the same; and it would be not a little strange, that the legislature should actually intend in the body of the act to discriminate the cause of action in the case of residents about to abscond, and leave the cause of action, in the case of non-residents, to be guessed at from the preamble and the ambiguous manner in which the word *debt* is used in the fourth section.

However, whether this is susceptible of reasonable doubt, or whether the word *debt*, may or may not be taken in its popular acceptation, it is a well settled principle, that statutes in *pari materia*, or upon the same subject, must be construed with a reference to each other; and what is clear in one statute, is called in to aid what is obscure and doubtful in the other.

If it is doubtful under the act of one thousand seven hun-

dred and five, whether the cause of action is confined strictly to *debt*: is not this doubt effectually removed by the words *debt, claim, or demand*, in the third section of the act of one thousand seven hundred and eighty nine? These words clearly relate to the plaintiff in a foreign attachment. If the cause of action was intended to be confined to *debt*, can any one account for the introduction *here* of the word *demand*; and it must be remembered, that this act passed after the case of *M'Clenachan et al. against M'Carty*, (*h*) in which it is remarkable, that Judge Shippen, in speaking of the sum recovered in the fourth section of the first act, calls it *debt*, but whenever he speaks of the original cause of action, which he has done at times, he uses the word *demand*. The above act also passed after the cases of *Vienne against M'Carty*, (*i*) and *Doane's adm. against Penhallow et al.* (*k*) in which the courts had decided, that they would enquire into the plaintiff's cause of action, and if they found it not to be such as would entitle him to hold the defendant to special bail, they would dissolve the attachment.

In the case *M'Clenachan et al. against M'Carty*, the practice under our acts of assembly, is judicially recognised. It is said to be, first, to obtain judgment against the defendant; then to file a declaration against him according to the nature of the *demand*: If in *debt*, the judgment stands for the sum declared for, without even an oath to support it. If in *case*, a writ of enquiry issues, for a Jury to ascertain the *demand*; and then the *scire facias* against the Garnishee: no actual notice is given to the defendant of the execution of the writ of enquiry, his attendance is never expected, and is in most cases impossible; it seems to be a mode adopted not for the trial of the merits, but only to conform to the nature of an action on the *case*, which requires a jury of enquiry to ascertain the sum, for which the execution is to issue; and it may be considered as a proceeding to inform the mind of the court, in the room of the supposed *oath in the action of debt*.

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(*h*) 1 Dallas 375.(*i*) 1 Dallas 154.(*k*) 1 Dallas 218.

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Judge Shippen has observed a marked distinction *between an action of debt, and an action on the case.*

For the sake of pursuing the subject with perspicuity, the court will now consider the nature of the plaintiff's demand, independent of the particular manner in which the affidavit is drawn. The defendant, for a valuable consideration, promised to deliver to the plaintiffs, a large quantity of teas of a certain quality, which he has not done.

If teas of the first quality have not been delivered, and teas of the second quality only have been sent, the uncertainty of the plaintiffs' demand is not increased; the value of teas of the first and second quality forms the criterion, and the difference in the price or value is the amount of the plaintiffs' demand. The value of goods being the criterion, it cannot, in reality, be said to be more uncertain than in the common case of an assumpsit on a quantum meruit, for goods sold, in which the damages are unliquidated, and to be ascertained by a Jury. It is not clear that special bail would not be of course in such a case, without a Judge's order upon an affidavit specifically drawn under the English practice. In Blackstone's Commentaries, (a) it is said that special bail is required, as of course, only upon actions of debt, or actions on the case in trover, or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds; but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action, and therefore no special bail is taken thereon, unless by a Judge's order.

In the present case it has been contended that Judge Shippen in the case of Doane's Administrator against Penhallow, meant to distinguish between cases, where special bail is of course, and where it is only discretionary, but it is hardly probable, if such a distinction had existed in his mind, that he would have omitted to make mention of it. He has used the word *entitled* which embraces both cases.

(a) 3 Vol. 291.

It has been further urged that the discretion being a legal one, Judge Shippen, in the case of M'Clenachan against M'Carty, meant to distinguish between debts arising on contracts; and that by an action on the case, he only meant an action on the case, where an *indebitatus assumpsit* would lie: here an observation occurs similar to the one just made, if such a distinction had existed in the mind of a judge so intelligent, would he have expressed himself in *general terms*?

In relation to the subject before us, can there, in reason, be a distinction? Did the legislature mean to make a discrimination in cases, where the mischief is equal; that where a man parted with his goods on the promise of receiving a certain sum of money, or where no price was fixed, that in either of these cases, if the contract was broken, a foreign attachment would lie; but on the reverse, if a man parted with his money, in consideration that goods should be delivered, that a foreign attachment would not lie, although the goods were not delivered according to the contract? It is not to be credited, that a remedy was intended in the one case and not in the other.

It was admitted in the argument, that for goods sold without a price being stipulated, the cause of action would be sufficient, yet in that case the damages are unliquidated and to be ascertained by a jury; and in strictness an *indebitatus assumpsit* would not lie. It is an *assumpsit*, on an implied promise to pay as much as the goods are reasonably worth, and it is not stated in the declaration, that the defendant being *indebted* promised to pay as in the case of an *indebitatus assumpsit*. The strictness, however, is released according to the modern practice in England, and now the value may be recovered where no price is fixed, without inserting a count of a *quantum meruit*.

In the case of Doane's administrator against Penhallow, the cause of action sounded in damages, and it does not appear that any objection was made on that account, although the case underwent a serious investigation; and it cannot be imagined that the counsel did not raise every objection they considered.

In the present instance, if there had been a covenant containing the same contract, with a penalty, the damages would

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have been equally uncertain; yet in an action of debt on the penalty, it could hardly be questioned that the cause of action would not have been sufficient. Much reasoning has been employed, in comparing the acts in question with the bankrupt system, the English statute of set off, our own act of defalcation, the insolvent laws, the act directing the order in which intestates' debts are to be paid and some others. The court will not enter into a minute investigation of the arguments drawn from these sources—they will content themselves with observing, generally, that acts which are independent of each other, and which differ in their objects, cannot often be resorted to with much advantage.

From the whole design of the foreign attachment acts, and from the invariable practise under them, the demand of the plaintiff ought to arise upon a contract, and be of such a nature as would *entitle* him to hold the defendant to special bail.

Upon the whole, the court are of opinion, that the nature of the plaintiffs' demand forms such a cause of action, as will support a foreign attachment. This point has been decided as above in the Circuit Court of the United States, for this District.

A minor question remains, viz. Is the affidavit sufficiently positive? The affidavit might have been drawn in a manner more particular and satisfactory, yet it may be deemed sufficient under the *rules and practice* of our courts. The debt is positively sworn to, and it is on a contract of a nature that affords the plaintiff an opportunity to swear with the usual degree of certainty; besides, in the case of a foreign attachment, our courts have not been so strict, as in cases of *capias*, where the defendant might be deprived of his liberty. (a)

The court has been requested to compel the plaintiffs to file a statement of their demand, agreeably to an act of Assembly, passed the twenty-first of March, one thousand eight hundred and six; but from a bare inspection of the act, it is at once to be discovered, that it does not apply to the

(a) 1 Dallas 154 and 160 Taylor against Knox,

case of a foreign attachment, where the defendant is not in court; for after the plaintiff has filed his statement, the defendant, at least twenty days before the next succeeding term, is to file a statement of his account against the plaintiff's demand, if any he hath.

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The Rule obtained on the plaintiffs to shew their cause of action and why the attachment should not be dissolved, is ordered to be discharged.

Rule discharged.

BINNS against M'CORKLE.

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October 26.

JOHN BINNS, the editor of the Democratic Press, instituted a suit against William M'Corkle, for a libel, in printing and publishing in a certain newspaper called "The Freeman's Journal and American Daily Advertiser," number 1382, a certain false, scandalous, wicked, and malicious libel of and concerning the said John Binns, containing therein the matters following, that is to say, "This Mr. Binns, who openly advocates Buonaparte's conduct, and maintains his interests in this country, is the same editor of the Democratic Press, who incautiously acknowledged some time since, that if the French government had not have paid him the subscription price of five hundred papers annually, he would have been unable to carry on his paper."

The question, whether the conduct of a person shall be mitigated or justified who republishes a piece reflecting on the character of an individual and gives the publisher's name at the time, must always depend on the motives with which the republication is made.

The declaration contained four counts, all for the same publication, but with different innuendoes.

The plea was *non cul.*

On the trial of the cause, the plaintiff proved the publication of the libel on the sixth day of August, one thousand eight hundred and eight.

If the republication is made with malice and an intention to injure, the original publication can be given in evidence only in mitigation of damages;

but if the republication is made innocently and without malice, the republisher is justified.

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M'Kean and Lewis, for the defendant, relied on, for his defence, that he had copied the paragraph from the "Federal Republican," a paper published in Baltimore; and had given the name of the publisher of the paper at the time. They read the following introductory remarks from the defendant's paper, which immediately preceded the libel for which the suit was instituted. :

"In the Baltimore "Federal Republican" of yesterday morning, we find the following very extraordinary sentence. "We publish it without comment."

They then read from the "Federal Republican" of the fifth day of August 1808, the following passages.

If more of the democratic editors had the honesty to speak out without disguise, as to their real views and attachments to the French government, we should have a pretty string of hirelings to present to the public. This Mr. Binns, who openly advocates Buonaparte's conduct, and maintains his interests in this country, is the same editor of the Democratic Press, who incautiously acknowledged, some time since, that if the French government had not have paid him the subscription price of five hundred papers, annually, he would have been unable to carry on his paper. That the *moniteur* of the city is in the same interest, we think can no longer be doubted. The piece, which appeared under the editorial head of that paper some days since, evidently intended to prepare the way for a war with England and an alliance with France, clearly evinced the purposes of the supporters of administration. The signal has been followed up, and it is time that the people should unite in opposition to so black and ruinous a purpose. Read what follows, and no longer doubt that Buonaparte has his presses in this country, paving the way for his entrance among us.

THE ALARM BELL.

TREASON! TREASON! TREASON!

"The citizens of the state of Pennsylvania are requested to read the following, copied from the Democratic Press of last evening. We did not intend to notice that paper again,

but the avowal is so treasonable, so monstrous, and so befitting one of Buonaparte's emissaries, that a mark ought, like Cain, to be fixed on him. It is an old saying, "the greatest rogue cries out rogue first;" hence the cry of British party and British faction, has been raised by a set of abandoned men, in order to turn the public attention from themselves, until it was time to throw off the mask—They have thrown it off: and now, since Buonaparte has become master of Spanish South America; since he has become a neighbour to the United States, *they boldly acknowledge they belong to a French party in America!!*

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That there is a British party in America, has never been acknowledged, and has ever been indignantly denied. It cannot be believed. No American will ever belong to any other party than his country. If he did he would deserve the pillory. But read what *French Tories* dare to promulge in the face of the laws, in the very capital of the United States. Read, and mark the miscreants.

From the Democratic Press, Printed by John Binns.

"I believe there is not a man in America, who does not belong to a *French party*, or an English one."

"I acknowledge I belong to the *former*."

"I believe *Buonaparte* never did, nor ever will commit an act of violence against us."

"I believe the *stripling* was sold by his brother into Egypt, he being chosen to do a great work."

"I believe *Moses* was preserved in the bulrush basket, floating on the Nile, being chosen to do a great work."

"I believe the *stripling David* was taken from the sheep-fold, and preserved, when he cut off the skirt of Saul's garment, being chosen to do a great work, for he had a *Goliah* to slay."

"I believe the *stripling Napoleon*, of Corsica, was preserved at Dunkirk, at Arcole, at Lodi, Marengo, and a hundred other places, being also chosen to do a great work, for he has a *Goliah* yet to slay."

"I believe *Simon Snyder* ought to be Governor."

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“I believe *James Madison* possesses every qualification requisite, and is fully competent to discharge the duties of President of the United States ; and *he will pursue the line laid down by Mr. Jefferson.*”

“I believe the writer of this creed is a *democrat*, if he is not mistaken in the *meaning* of the word.”

It is signed

“J. B.”

After this tissue of *Treason* and *Blasphemy*, in comparing those holy men, who were *types* of the redeemer, to *Napoleon*, we ask of the people, what they think of these things ? And the coupling of *Snyder* and *Mr. Madison*, in the same breath ; with the acknowledgment of a French party in America, irresistably forces itself upon our attention.

Well was it said of old—“If these things are done in the green tree, what will be done in the dry ?”

If *traitors* avow their intentions at the present time, what are they not *prepared* for ? Mark the miscreants—*Freeman's Journal*.

They afterwards produced and read from the Democratic Press of the twenty eighth day of July 1808, the following :—

THE POLITICAL CREED OF AN OLD REVOLUTIONARY OFFICER.

I believe that all men are born equally free, possessing certain privileges given to them by Nature, and Nature's God, which no created being can, of right, take away.

I believe that all power, with respect to government is, and of right ought to be, lodged in the people.

I believe from the oppression of the people (by their rulers) in the old world, Providence hath raised up America, great and free, to be an asylum for the oppressed of all nations.

I believe the councils of England in 1776, waged an unprovoked, cruel, bloody and savage war against us, offering a reward for our scalps ; and I believe as many miracles were wrought, and the Almighty's arm made as bare in our deliverance from British thralldom, as in delivering the Israelites from Egyptian bondage.

I believe that a *Fi. fa.* for costs, on the seven years trial,

should issue against Lobster-back George; for those that lose the cause always pay costs; and that *Marshall* and *Burr* should receive a retaining fee.

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I believe we are the most happy and the most free of any nation on earth; the reason why, because the power is in the people.

I believe our prosperity, growing strength and unparalleled increase of commerce, hath filled the cabinet of St. James with jealousy and envy.

I believe their hostility to us at this time, (as a nation) is as great as when Cornwallis surrendered to Washington and Rochambeau at Yorktown, or Burgoyne to Gates at Saratoga.

I believe one million of guineas are annually distributed in this country amongst British subjects, old tories, traitors, and apostate printers, for the purpose of deceiving and dividing the people, for that is their last hope.

I believe the people of England and her councils have been deceived and led into many errors, with respect to our strength and our union, by tory writers and printers.

I believe the guineas are now flying through Pennsylvania, for the election of Mr. Ross, in which if they succeed, I shall set it down as the first step towards (not a federal but) a British triumph, for I believe Pennsylvania to be the key stone of the great arch of Democracy—take away the key and the arch must fall.

I believe what is falsely called federalism, I call it toryism, because all the traitors and English agents fall in their ranks, if that kind of *ism* should succeed throughout the Union, their first steps would be to force on a war with France; not that they love fighting, but to furnish them with a feasible plea to become the friend, ally and partner, of a cruel, unjust, tyrannical, bloody, profligate, and bankrupt government.

I believe there is not a man in America who does not belong to a French party, or an English one; as to their private wish, they cannot be neutral on the great contest in Europe; they wish one or the other to conquer, and they have their reasons for it. I acknowledge I belong to the former; the latter made a beggar of me once, and I will not trust them again.

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I believe the man who sets my house on fire is my enemy; and he who puts it out, my friend;—a burnt child dreads the fire.

I believe Buonaparte never did nor ever will voluntarily commit an act of violence against us,—but when forced by British examples and self-defence; and then he will soon find a French Rowland for their British Oliver.

I believe James Madison possesses every qualification requisite, and is fully competent to discharge the duties of President of the United States, and that he will pursue the line laid down by Mr. Jefferson; I hope he will be elected.

I believe James Ross to be a scholar, a statesman, and a gentleman; but very wrong in his politics, better suited for London than Philadelphia, and therefore, I think, ought not to be governor.

I believe Simon Snyder possesses a strong mind, great natural talents, inflexible integrity, uncontaminated republicanism, and a sound judgment, and therefore ought to be governor.

I believe there has not been an election, since we were a nation, of more importance, and which called more for the united strength of republican candour, than the approaching one; for toryism, traitorism, Englishism, and federalism, (so called) aided by lies, intrigue and gold, will be played off against honest democracy.

I believe the people of Ireland to be hardy, generous, and brave, and oppressed beyond bearing (read Plowden's history); and I hope the Corsican regulator of Europe will emancipate them.—Wolfe, Tone, and Emmet, should rank with Montgomery and Warren.

I believe the murders committed by the British, from lord Clive's time, to the present moment, are calling aloud for vengeance.—Lobster-back must feel as his brother Crook-back did at Bosworth-field.

I believe England's cup of iniquity is full and running over, and I believe the day of retribution is at hand.

I believe the Stripling was sold by his brethren into Egypt, he being chosen to do a great work.

I believe Moses was preserved in the bulrush basket floating on the Nile, being chosen to do a great work.

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I believe Washington was preserved at Braddock's field, at West Point and from the poisoned cup at New York, being chosen to do a great work,—and he finished it well; so said Cornwallis.

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I believe the stripling David was taken from the sheepfold; and preserved, when he cut off the skirt of Saul's garment, being chosen to do a great work, for he had a Goliath to slay.

I believe the stripling Napoleon of Corsica was preserved at Dunkirk, at Arcole, at Lodi, Marengo, and a hundred other places, being also chosen to do a great work, for he has a Goliath yet to slay.

I believe the Corsican is chained, and when he has got to its length, and not before, his master will say, "stop, thus far thou shalt go and no further."

I believe that whilst the councils of this country are governed by the principles of 1776,—do justice to individuals and to nations, prefer peace to war; the saving of blood, to the shedding of it; sustain the same character at home, and abroad, as they now have; pursue the same course they have for near eight years past, by maintaining the strong neutral ground they have taken, making Justice their guide; Peace their path, and Mercy their citadel;—the navy of England, and the armies of France combined, may attempt but cannot shake it.

I believe the writer of this creed is a democrat, if he is not mistaken in the meaning of the word.—Finally,

I believe the same Providence, that guided our councils through a seven years cruel and unequal war, and who gave us a rank amongst the nations of the earth; will continue to protect and support us so long as we continue to deserve it.

J. B.

To rebut this testimony, the plaintiff offered in evidence the "Freeman's Journal" of the twenty-ninth day of July 1808, to shew, that all that part of the publication which was read from the "Federal Republican," and which follows

1841. the words "Alarm Bell," originated in the "Freeman's
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 M'CORKLE. "Journal" and was published therein, prior to the time it
 appeared in the said "Federal Republican."

To this evidence the counsel for the defendant objected; but the objection was overruled by the court, and the evidence admitted.

It was also proved, that "the political creed of an old revolutionary officer," was the production of John Barker, Esquire.

It further appeared, that, prior to this suit being instituted, the plaintiff, in company with a friend, waited on the defendant; that the plaintiff presented the "Freeman's Journal" of the sixth of August, and inquired of the defendant, if he had any evidence to induce him to believe that the charge of his (the plaintiff's) being in the pay of Buonaparte, was well founded; M'Corkle said he had not, that he had published it as he had found it in the Baltimore paper, without any comment, as he had no evidence respecting it, one way or the other; that the plaintiff then asked the defendant if he would publish a paragraph, to that effect, in his paper of that evening; that the defendant hesitated, and the plaintiff drew up and handed to him a paragraph in these words:

"In the 'Freeman's Journal' of Saturday, we quoted, from the Federal Republican of Baltimore, a paragraph, in which, the editor of the Democratic Press is charged with having incautiously declared, that his paper could not have been supported, had he not received from the French government the subscription price of five hundred papers annually." "When we published that paragraph, we had not, nor have we now, any, the slightest evidence, in support of the assertion it contains."

This paragraph the defendant positively refused to publish, asking the plaintiff if he thought he was such a fool as to publish it; and giving certain reasons which the witness could not recollect: that the defendant then wrote a paragraph which he was willing to publish; it was in the following words:

"John Binns called upon me this morning, and requested to know whether I had any evidence of the truth of a para-

“ graph, which appeared in the Freeman’s Journal of Satur-
 “ day evening, and quoted from the Federal Republican of
 “ Baltimore, relative to the said Binns having ‘ incautiously
 “ acknowledged, some time since, that if the French govern-
 “ ment had not have paid him, &c.’

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“ I informed him, that having never seen the paragraph
 “ before, I could neither believe or disbelieve it, but had
 “ published it, that he might answer it, *if not true.*”

Upon this evidence, it was contended by Barnes and Browne and by Binns in *propria persona*, that the plaintiff was entitled to a verdict for damages.

They took the distinction between actions for slander, and actions on the case for libels; they admitted, that, in the former, if a defendant, at the time of republishing the slander, discloses the author’s name and a precise statement of the author’s words, so as to enable a party injured to maintain an action against the author, he would be justifiable;(a) but they denied that the rule extended to libels; and contended, that every copying of a libel was *conclusive* evidence of a publication,(b) and the republisher was answerable, equally with the first publisher.

They also urged, that to admit, as a justification, proof that a libel had been previously published by another, would place it in the power of a malicious person, to injure a citizen without allowing him any redress; for, it would be an easy matter for one who was desirous to publish a libel, to procure it to be inserted in some obscure paper, or to be published by an obscure character.

They agreed, that, upon the principle contained in the decision of the chief justice in Morris against Duane,(c) it was competent for the defendant, *in mitigation of damages*, to lay before the jury the evidence of his having extracted the libel from another paper; but they insisted, that the jury should take into consideration, that the defendant had published, in his paper of the twenty-ninth day of July,

(a) 3 Selw. N. P. 1080. 12 Co. Rep. 134, Lord Northampton’s case, 1 Lev. 82, Crawford against Middleton.

(b) 9 Co. Rep. 59. Moor 813. Hawkins P. C., B. 1, ch. 73, sec. 10, 2nd vol. 131.

(c) 1 Bin. Rep. 90. Note.

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the piece entitled the "Alarm Bell," which contained a creed, *pretended* to have been copied from the Democratic Press of the evening before, but which was mutilated and falsely quoted; that it was the publication of this piece, that had caused the paragraph in the Federal Republican; and that the defendant, with a full knowledge of the manner in which this latter publication had originated, had republished it, pretending to be ignorant and innocent thereof; these circumstances, they insisted, were unanswerable proofs of the malice of the defendant; and, instead of mitigating the damages, had aggravated the original cause of action.

On behalf of the defendant it was contended, by *M'Kean* and *Lewis*, that the distinction made by the plaintiffs counsel, was not well founded; but that, in cases of *libel* as well as actions of slander, if the defendant, at the time of publishing the words complained of, gives his author, it may be pleaded *in bar*; and if he *afterwards* gives his author, it may be given in evidence *in mitigation of damages*.(a) A contrary doctrine, they said, would chain the hands, and seal the mouths of the historian and biographer; and would prevent that free communication of ideas, which is the birthright of the citizen, and is secured by the constitution. That if the publishers of a newspaper were to be answerable, to the extent contended for by the plaintiff's counsel, they would be afraid to republish the most sacred truths; but the curiosity of mankind could not be restrained; information respecting individuals and transactions, would fly upon the wings of common report; a story originating in one part of the union, gaining strength as it gained currency, would be entirely misrepresented before it had traversed one quarter of the United States. To such a state would society be reduced, that our citizens would be afraid to communicate on common and ordinary subjects; social beings would be transformed into dumb creatures; eventually our printers would refuse to publish an advertisement offering a reward for a thief. Doctrines such as these, they said, would sink the liberty of the press, from

(a) 12 Co. 134. 1 Lev. Rep. 72. 3 Selw. N P. 932, 1060, 1 Saund. 131. Lake against King.

sterling gold to mere dross, and would be a more deadly stab, than it had received since the time of the bloody reign of the Star Chamber.

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Per CURIAM.

Hemphill, President,

To the jury, after stating the case.

Was the editor of the Freeman's Journal justified in republishing the sentence in the manner he did?

This question is very important, it being a general one and to govern in all cases.

The rule, in the case of slanderous words spoken, is, that if a person utters the words generally, he is not allowed to justify himself, by disclosing for the first time, by his plea, or at the trial, the name of the author; it can then only go in mitigation of damages: but if, at the time he repeated the words, he gave the name of the author so that the party injured might have his action against him, the law allows this to be a justification; but there has been no express decision produced, to shew that this rule has been extended to the republication of a paper, containing a libel. A libel, in some respects differs from slanderous words spoken; it is more criminal, being more deliberate and having a tendency to a breach of the peace.

It appears strange that there has been no decision on this point.

The court however, in extending the rule to the case of a libel, ought to be governed by sound policy, bearing in mind the nature of our government and the freedom of the press.

An unrestrained communication through the medium of the press, and without a previous licence, forms one of the greatest political blessings we enjoy; but this, like every good, has its alloy of evil. On this subject it has been justly remarked by a celebrated author, that the unbounded licentiousness of the press, and the *danger* of bounding it, will

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always form a problem capable of puzzling the wisest politicians.

On the propriety of extending the rule to the republication of a libel, much may be said on both sides.

On the one hand, if the rule is not extended, it is said that it will operate as a shackle on the press; upon the other, that if it does apply in the case of a libel, editors may take unfair advantage, by getting a piece put in some obscure paper, in some remote part of the union, and then republish it, with *impunity*, in the neighbourhood of the person who is the object of the libel.

Will it not upon the whole be safest, and best accord with the general principles of law relating to the subject, to leave the motives of the republisher to the jury. If the republication is made with malice and an intention to injure, let the original publication go only in mitigation of damages; but, if it appears that the republication is made innocently and without malice, let the republisher be excused, if, at the time of the republication, he gave the true source of his information, so as to afford the injured party an opportunity of bringing an action against the real libeller. This will always leave the intention to the jury, who can guard and watch over the motive of the republisher.

If an editor sees a paragraph in a *distant* and *obscure* paper, calculated to wound the feelings, or impair the reputation of another, why, it may be asked, should he take it up and give it a wider circulation; such a circumstance, however, under the rule laid down can only weigh as evidence of malice. A case may be imagined, wherein the republisher would appear in a different light; as, if he should quote from a distant and respectable paper, the name and description of a person, said to have absconded on account of the commission of a crime; here the republication might arise from motives of public good.

These observations are made upon the subject generally; for, in this case, as the plea is not guilty, the court are not satisfied that the question can be properly decided under that plea. In similar cases for words spoken, the defendants have justified by special pleas.

DALE and REINHOLD to the use of KINGSTON against OLIVER.

1811.

October 26.

THE case was arbitrated, and from the award, which was in favor of the defendant, the plaintiff appealed. The affidavit, on which the appeal was founded, was made by Dale.

On an appeal from the decision of arbitrators in a suit brought in the name of two persons to the use of another, the oath may be made by one of the nominal plaintiffs.

On motion of *Chauncey*, for the defendant, a rule was obtained to shew cause why the appeal should not be struck off.

He contended, that pursuant to the directions of the eleventh section of the arbitration law, (a) the oath should have been made by *Kingston* or his attorney. The words are :

“ The party appellant, whether plaintiff or defendant, his, her, or their agent or attorney, shall swear or affirm, that it is not for the purpose of delay, such appeal is entered, but because such party *firmly believes* injustice has been done.”

He admitted, that a stranger might conscientiously make that part of the deposition which relates to the *injustice*, but he insisted, that none but the party making the appeal, could swear to the *motives* with which the appeal was made. The question then was, who was meant by the *party*? and he contended that Dale and Reinhold, whose names were used merely to comply with the forms of Law, and who had no interest in the sum claimed, could not be considered as included under that denomination. That *the cestui qui use* alone had power over the action. (b) That it was at least doubtful whether a nominal plaintiff was liable for the costs of suit, (c) and if the present plaintiffs were liable for the costs, it was not such an interest as the act contemplated.

Lastly. He insisted, that in case the oath was to have been made by the nominal party, it should have been made by both the plaintiffs.

J. R. Ingersoll, contra, stated, that it was a pretty gene-

(a) Passed the 20th March, 1810.

(b) 1 Dall. Rep. 139, M'Cullum against Coxe. 2 Dall. Rep. 265 Zantzinger against Old.

(c) 2 Dall. Rep 172, note to the case of Field for the use of Oxley et al. against Biddle.

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ral opinion, that the arbitration law, if it did not infringe on the constitution, at least threatened to impair the trial by jury ; and he presumed the court would feel it not only their inclination, but their duty to construe its provisions, so as it would have the least tendency thereto.

That the principal object of the arbitration system, was to facilitate proceedings in courts of Justice. The practice under the first act soon evinced, that appeals were too easily entered, and that the object of the Law was, in a great measure, defeated. The Legislature, in the second act, provided two remedies for the evil. First. Obliging the party appealing to pay the costs : and

Secondly. Requiring him to make the affidavit which had been mentioned.

The payment of the costs would, in most cases, prevent those appeals which were intended for the purposes of delay ; for the amount of the costs would mostly exceed the interest of the money; but least any one should be disposed to sport with his wealth, at the expense of his adversary, the legislature had superadded the *oath*. The spirit of the law requires the *oath*, but it does not require the oath of one person, more than any other of equal credibility. The *cestui qui use* might be absent, or indisposed, and unable to make the deposition.

But, he contended that Dale and Reinhold were the parties appealing; strictly and legally speaking, the interest was in them : moreover, they were liable for the costs, which, alone, was sufficient to authorise the appeal.

But it had been said the oath should have been made by *all* the parties appealing :

If the suit was brought by a corporation aggregate, would the court require the oath to be made by every member? He presumed they would not; but, if the position contended for was well founded, the court would be bound to make the requisition.

The Court discharged the Rule.

Rule discharged.

HOPKINS *against* DEAVES.

1811.

October 26.

ON the nineteenth day of September one thousand eight hundred and eleven Samuel Deaves gave Howell Hopkins his bond in the penalty of fourteen thousand seven hundred and seventy nine dollars and seventy cents, conditioned as follows :

“ Whereas the said Samuel Deaves, hath purchased of and from the said Howell Hopkins, all his share and portion of the stock in trade in the late firm and co-partnership of Samuel Deaves & Company, and for which the said Samuel Deaves, hath and doth agree, engage and assume to pay and satisfy eleven certain promissory notes drawn by the said Samuel Deaves in favor of the said Howell Hopkins, and by the said Howell Hopkins endorsed, and one drawn by the said Samuel Deaves and Company, in favor of William Pennock and Son, and by them endorsed as follows, to wit :

The defendant gave the plaintiff a bond and warrant of attorney, which was conditioned to pay and take up certain promissory notes ; and also, that he should fully and completely indemnify the plaintiff from all damages, &c. which he might sustain by reason of the notes. The first note was protested for non-payment; upon which the plaintiff took execution for the whole amount of the notes. The defendant having taken up the note that was protested, the court set aside the execution.

“ One note dated April 15, 1811, at 6 months for	£ 598 40
“ One do. dated April 15, 1811, at 7 months for	593 40
“ One do. dated April 15, 1811, at 8 months for	593 40
“ One do. dated April 15, 1811, at 9 months for	593 40
“ One do. dated April 15, 1811, at 10 months for	593 40
“ One do. dated April 15, 1811, at 11 months for	593 40
“ One do. dated April 15, 1811, at 12 months for	593 40
“ One do. dated April 15, 1811, at 13 months for	593 40
“ One do. dated April 15, 1811, at 14 months for	593 40
“ One do. dated April 15, 1811, at 15 months for	593 40
“ One do. dated September 18, 1811, at 30 days for	455 86
“ One do. dated July 2, 1811, at 60 days for	1000 00

“ Making in the whole the sum of seven thousand three hundred and eighty-nine dollars, and eighty-five cents; the last of the above recited notes, is the one drawn in favor of William Pennock and Son, and endorsed by them as aforesaid.

“ Now the condition of the above obligation is such, that if the above bounden Samuel Deaves, his heirs, executors,

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“ or administrators shall and do well and truly pay and take
“ up or cause to be paid and taken up all and every of the
“ aforesaid twelve several promissory notes, on the respective
“ days and times mentioned for the payment thereof, and
“ shall fully and completely indemnify and save harmless
“ the said Howell Hopkins, his executors, and administra-
“ tors and his and their goods and chattels, lands and tepe-
“ ments of and from all damages, sum and sums of money,
“ costs and charges whatsoever, which he or they or any
“ of them, shall or may at any time or times hereafter sus-
“ tain or be put unto by reason or means of the aforesaid
“ promissory notes, then the above obligation to be void,
“ else to be and remain in full force and virtue.”

Accompanying this bond, was a warrant of attorney, by virtue of which, judgment was entered the first day of October, 1811.

The first note, which fell due the 15th—18th October, was protested for non-payment.

On the nineteenth day of October a *fieri facias* was taken out, on which the real debt was indorsed seven thousand three hundred and eighty-nine dollars and eighty-five cents.

After the execution was levied, the note was paid and taken up by the defendant.

A Rule was obtained, to shew cause why the execution should not be set aside.

Ross and Hallowell argued thus, in support of the Rule.

The case presented to the court, calls loudly for their interference, as the defendant is oppressed, under cover of legal process.

The plaintiff and defendant, as co-partners in trade, issued their promissory notes, payable at distant periods; afterwards, the plaintiff wishing to withdraw from the firm, the defendant agreed to substitute himself in the place of the company, and take up these notes as they respectively came

to maturity. One note, only, had become due, and that has been paid by the defendant; and yet, the plaintiff insists on withdrawing from the defendant, the whole amount of the notes; and thus deprive him of the only means of meeting his engagements.

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HOPKINS
against
DEAVES.

It is true, that at common law, a penal bond was considered as forfeited, if the condition was not performed *at the day*; but the statutes of 8 and 9, William 3. Chap. xi. and 4 Ann, Chap. xvi. were introduced, to prevent plaintiffs, in cases of this kind, from converting that power, which the strictness of the common law gave them, into an engine of oppression. After a breach of the condition, a suit may still be brought; but, upon the defendant's bringing into court all that is due; and, in case the sum is payable by instalments, upon his agreeing to let the verdict stand as a security for future payment, the court will order all further proceedings to stay.(a)

In this case, there is nothing due; and the plaintiff has no right to expedite the payment of the money. After paying the plaintiff the whole amount of the bond, the defendant may be compelled to take up the notes, if they have passed into the hands of strangers.

Hopkins and *Sergeant* opposed the Rule, and said, that the application of their opponents must be considered with relation to the circumstances attending the transaction. It must be recollected, that this was not a suit instituted on a bond; but an application to the Court, of a defendant, for an extraordinary interposition of its power, in his favour. If they saw cause, they would undoubtedly interpose; but they would also impose equitable terms on the applicant. It must also be remembered, that the defendant, if aggrieved, had a remedy by suit; and therefore the Court would not feel over anxious to interfere.

At common law, if the money was not paid at the day, the bond was forfeited; and, in England, before the statute, the

(a) 1 Bac. abt. tit Conditions, 669. 2 Str. Rep. 814, *Bridges against Williamson*. Ibid 957, *Darby against Wilkins*. Selw. N. P. 517. 1 Saund. 58, N. 1. 3. Saund. 167, N. 2. 1. Bin. Rep. 152, *Sparks against Garrigues*.

1811. obligor had no remedy, but to apply to a Court of Chancery for an injunction. (a) If the statute of 4 Ann, chap. xvi. did extend to this country, it had no application to this case; it speaks of bonds *for the payment of money*, and allows the obligor to plead any payment, in bar to an action brought for the penalty; though such payment was not made strictly according to the condition or defeasance.

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DEAVES.

There being no Court of Chancery here, the courts of law have proceeded on a practice, borrowed partly from each court, and peculiar to Pennsylvania. (b) They consider the bond as forfeited; but to be redeemed, on equitable terms. In cases of suits brought, a difficulty sometimes occurs for want of sufficient power over the defendant; but, where an obligor has given a warrant of attorney, by virtue of which, judgment has been entered, and an execution has issued thereon, his application to be relieved, is strictly to the chancery power of the Court.

It then becomes necessary for the Court to enquire, what was the intention of the parties; for, if it had been agreed between them, that, execution should issue for the whole, if the defendant failed in the payment of any one note, the court were bound to carry that intent into execution. (c)

It appeared, that the firm was in debt; and that the plaintiff had agreed to part with that fund, which ought peculiarly to have been applied to the payment of that debt: but he had agreed to part with the fund, on this condition, that, in case the agreement was not complied with, the parties should be restored to their original situations. This was asking only, that the property of the *firm*, should be first applied to the payment of the partnership debts; a principle, the justice of which no one would dispute.

By allowing the very first note to be protested, the defendant had furnished unequivocal proof, either of his unwillingness, or inability to pay, and had evinced an intention not to perform his part of the agreement.

With respect to the words of the bond, they presumed

(a) 2 Black. Com. 341.

(b) 1 Binney 155.

(c) 3 Bur. Rep. 1370, Bonafous against Rybot.

they were sufficiently comprehensive to guard against the mischief; the defendant is not only to pay the notes, but "fully and completely to indemnify the plaintiff from all damages, &c."

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 against
 DEAVIS.

The only argument of any weight, that had been urged, was the risk the defendant would incur, that the money would not be properly appropriated. To obviate this difficulty, they would agree, to leave the money in court, to have it paid to a third person, or they would give security that the notes should be taken up, as they came to maturity.

Per CURIAM.

Hemphill, President.

If a man enters into a *single* bond, for the payment of several sums of money, at several days, debt will not lie until the last day is past; but if it is a bond in a *penal* sum, conditioned to pay money, at different days, the condition is broken and the bond becomes absolute, upon failure of payment at either of the days. On the forfeiture of the condition, the whole penalty was, at one time, recoverable at law; but the Courts of Equity interposed, and would not permit a man to take more than in conscience he ought. The Courts of Law had also adopted in some measure, the same practice. At length the statute of 8 and 9 William III. and the statute of 4, of Ann were enacted. The statute of 8 and 9 of William 3, did not include common money bonds conditioned to pay a less sum at a day certain, which were afterwards protected by the statute of 4 Ann. The statute of 8 and 9 William III. was meant to meet the case of bonds, for the performance of any covenants, or agreements in any indenture, deed or writing and to be performed at different times; or money to be paid by instalments, &c.

After the enactments of these statutes, the Courts of Law in England, in the case of a bond conditioned to pay by instalments allowed judgment to be entered on the penalty, whenever it was forfeited by the non-payment of any instalment,

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DEAVES.

with a stay of execution as to the other instalments, until they became due: and in other cases, where the condition was to be performed at different times, the judgment is recovered as usual; and to remain as a security to answer such damages as shall be sustained for further breaches, &c. upon which the plaintiff can have a *scire facias*. The statute of 8 and 9 of William III. Chap. XI. extends to this state, and the first 13 sections of 4 Ann, are also in force in Pennsylvania, (a): the 12th and 13th sections are those which relate to the payment of principal interest and costs on bonds. If neither of the statutes had been extended hither, the Courts, to prevent a failure of justice, would have effected the same objects by the exercise of equitable powers.

The warrant to confess judgment, cannot give the plaintiff any additional advantage over the penalty, further, than its remaining as a security; the warrant being only an instrument subservient to the bond and the intention of the parties. (b) This brings the Court to consider the particular words in the condition; for it is at present the chief object of Courts of Law, to discover the true meaning of the parties, and to construe their agreements accordingly. Whatever agreement the parties have entered into, they must be bound by it. It does not appear to the Court to have been the intention of the parties, that if one of the notes were not paid at the day, the obligee should then have a right to compel the obligor to pay the amount of all the other notes, before they were due. The last of the notes was not due, for five or six months after the first note was payable. If the obligee could compel the obligor to pay the amount of all the notes, on his failure to pay the first note, he would have the use of the money until the notes were payable, though they do not appear to carry interest; and then the money might possibly be applied to other purposes, and the obligor left liable. This would sensibly change the agreement of the parties. The condition can only mean, to save harmless from any failure of payment; it is expressly said, "which he or they or any of them shall or may at any time or times sustain." Per-

(a) 3 Binney 625.

(b) 1 Dallas 133.

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sonal credit was given to the obligor, at the time the bond was executed; and the court cannot be influenced by any alteration in the circumstances of the parties, since that period.

1811.

HOPKINS
against
DRAVES,

In the case of Gowlett, executor of Gladwell against Hauforth,^(a) the words were very different from those in the present case: they were, "and if default was made in the payment of any one or more of the installments, then the bond to stand in force for the whole principal and interest then remaining due and unpaid."

There was no doubt as to the actual intention of the parties in that case. So likewise, in the case of Bonafous against Rybot,^(b) the intention of the parties appeared plain.

The court are of opinion that the rule should be made absolute.

Rule absolute.

KERR against SMITH.

November 1.

IN this case and a case of Smith against Kerr, the parties had agreed to wave their right to appeal from the decision of arbitrators; after which, the defendant entered an appeal.

An agreement, not to appeal from the decision of arbitrators is binding; and if one of the parties afterwards appeals, the court will dismiss the appeal.

The court, on motion, and after argument, dismissed the appeal.

Hopkinson, for the plaintiff.

Hopkins, for the defendant.

MUSSI against LORAIN.

November 1.

ON motion of William Milnor and Sergeant, for the defendant, a rule was obtained to shew cause why a new trial should not be granted.

The court refused to grant a new trial, where the defendant, having made an assignment, his assignee received the notice of trial, but did not forward it to the defendant.

assignment, his assignee received the notice of trial, but did not forward it to the defendant.

(a) 2 Black 958.

(b) 3 Burr. 1370.

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against
LORAIN.

Previously to the trial, the defendant had made an assignment of his property. The notice of trial having been directed to the defendant, was put in the post-office by his counsel. It was taken out of the post-office by the assignee, who opened and read it; but did not forward it to the defendant. He cited Jackson et al. against Vanhorn, (a) and Warren against Fuzz (b).

Browne contra.

PER CURIAM.

Hemphill, president,

An application for a new trial is made to the discretion of the court, under the peculiar circumstances of the case; and in cases of this nature, no positive rule can safely be laid down.

Generally speaking, each party is bound to take notice of the time of trial, the commencement of the court being fixed by law.

The defendant was not misled by any mistake, as in the case in Dallas; and his assignee had actual notice; we think therefore that the rule must be discharged.

Rule discharged.

1811.

ESTANSON *against* DUPUY.

November 4.

The eleventh section of the arbitration act was intended, to prevent a party from withholding from the arbitrators, evidence which he had in his actual possession at the time of the arbitration.

THE defendant being a foreigner and about to leave the United States, prayed a special court, to hear and determine this action; whereupon the court assigned this day, and the cause came on before the common jury, who were summoned for the present term. (c)

(a) 1 Dall Rep. 241.

(b) 6 Mod. 22.

(c) Vide an act of assembly, passed the 22nd of May, 1722. 1 Vol. Bioren's ed. of L. P. 185.

The case had been arbitrated; and from an award in favour of the defendant, the plaintiff had appealed.

1811.

It was an action of indebitatus assumpsit; the declaration contained a count of *insimul computasent*; before the arbitrators, the plaintiff had produced and relied on a general account, stated and settled between the parties; which account comprised three subordinate accounts; these were not produced before the arbitrators, *not being at that time in the possession of the plaintiff*; they were now offered in evidence by Duponceau for the plaintiff.

ESTANSON
against
DUPONCEAU

To this evidence J. R. Ingersol for the defendant objected, and relied on the 11th section of the arbitration act, the words of which, as far as relates to this point, are as follows: "*And provided also, That the appellant shall not be permitted to produce, as evidence in court, any books, or documents, which he or they shall have withheld from the arbitrators.*"

But the court overruled the objection; they said, that the provision of the act to which reference had been made, was intended to prevent a party from withholding from the arbitrators, evidence which he has in his *actual possession* at the *time of the arbitration*.

M'GRAPH against DORFEUILLE.

1811.

November 16.

A FOREIGN attachment was issued, to September term, 1810; at March term, 1811, judgment was entered; and a writ of inquiry was taken to the following June term. A *scire facias* against the garnishee was made, returnable to September 1811; to which, *Duponceau* appeared.

On a *scire facias* against a garnishee in a foreign attachment, and interrogatories filed, the law requires the court to fix a day for the appearance of the garnishee; and they will

On the twenty-seventh of September, on motion of Reynolds, for the plaintiff, the following rule was obtained; "rule on the garnishee to answer in twenty days."

take care that a *reasonable* notice is given. When the plaintiff took his rule "to answer in twenty days," the twentieth day was the time fixed. Seven days are not a reasonable notice.

1811.

M'GRAPH
against
DORFVILLE.

A copy of the interrogatories and of this rule, were served on the garnishee on the tenth of October, 1811.

On the first of November, 1811, the plaintiff's counsel produced an affidavit of the service of the rule and the copy of the interrogatories; and prayed the court "to adjudge, "that the garnishee had in his possession, custody and "charge, goods, chattels, monies and effects of the defend- "dant; or was indebted unto the defendant, to an amount "and value sufficient to pay and satisfy the debt, claim or "demand of the plaintiff, together with all legal costs and "charges of suit."(a)

The court granted a rule to shew cause why the above judgment should not be entered, which now came on to be argued.

On the fourth of November, 1811, the answers were filed.

Duponceau and *Ingersol* for the defendant, insisted that the judgment could not be entered; the proceeding they said was very penal against the garnishee, inasmuch as it made him liable for the debt and costs; and, before the court would make the rule absolute, the plaintiff must shew, that *he* had complied strictly with the provisions of the act: this they contended he had not done; the act says, "that the garnishee "is required and enjoined to be and appear before the jus- "tices of the same court, on a day and time by *them* for that "purpose to be named, and *then* and *there*, in writing, ex- "hibit and file, under his or their oath or oaths, affirmation "or affirmations, full direct and true answers, &c."

That the court, in this case, had not fixed any particular day for the garnishee to appear and answer; it was true, they had granted the plaintiff's rule of the twenty-seventh of September, which was, to answer in twenty days; but that rule was not served until the tenth day of October; and they contended, that if the twenty days were to be calculated from the twenty-seventh of September, the notice was too short; and if they were to be calculated from the tenth of October, then the *plaintiff* and not the *justices* had named the day.

(a) Act, 28th September, 1789. 3 Vol. Bioren's ed. L. P. 379.

The plaintiff's counsel, *Phillips* and *S. Levy*, answered, that the garnishee had twenty days from the tenth day of October, though he might on any of the twenty days, have appeared and exhibited his answers.

1811.

M'GRAPH
against
DORFVILLB.

Per CURIAM.

The law requires the court to fix the day for the appearance of the garnishee, and we will take care that *reasonable* notice is given. In this case, it must be understood that we fixed the twentieth day; and as the copy of the rule and the interrogatories were served on the garnishee, only seven days previous to the expiration of that time, we think the notice was not reasonable, and therefore we discharge the rule. For the future, we will name a particular day, on which a garnishee shall be required to appear.

Rule discharged.

KEASBY *against* DONALDSON.

1811.

November 15.

THIS was an action of trover. The declaration enumerated the articles in the usual way.

The court would not, after the jury was sworn, grant leave to amend a declaration in trover, by inserting other articles.

After the jury had been sworn, *Grinnel* and *Condy*, for the plaintiff, moved for liberty to amend the declaration, by adding to the goods and chattels enumerated, "forty-two hides of upper leather and forty-two hides of harness leather," which, they alleged, had been omitted, by mistake.

They cited and relied on the sixth section of the act, to regulate arbitrations and proceedings in courts of justice.(a)

Newcomb, Browne, and Sergeant, contra.

The court rejected the motion; they said that they did not think the proposed amendment was authorised by the act

(a) Passed the 21st of March, 1806. 7 Vol. L. P. 563.

1811. **KEASBY**
against
DONALDSON. of assembly; if it was, a man might declare in trover for a horse and have liberty to insert in his declaration, a cow, or any other chattel; which would be very unjust, as respects the defendant. The act meant to authorise an amendment of a matter of *form*, even though the *merits* were affected; "any informality" are the words of the law.

Motion rejected.

1811.

WALLACE *against* **MELCHOIR.**

November 21.

If a debt is contracted for and on the credit of a building, and the articles are delivered at or near the building, at the place pointed out by the contracting party, with an understanding of the parties, that they are to be used in the erection thereof, a lien will be created on the building, although the articles are not used therein.

THE defendant contracted with the plaintiff, who was a lumber merchant, for a quantity of lumber, to be used in the erection of a building in the city of Philadelphia. The lumber was delivered from time to time at the building; but was not used in the construction thereof; being, without the knowledge of the plaintiff, sold and delivered by the defendant to different persons.

The plaintiff entered his lien against the building for the lumber, pursuant to the act of assembly, passed the seventeenth day of March, 1806.(a)

The building was afterwards sold by the sheriff; and the proceeds being insufficient to pay all the mechanics, the court directed an issue to be formed, to try the right of the plaintiff to the amount of his account.

Bradford and *Sergeant*, for the plaintiff, insisted that he had a lien on the building, by virtue of the act of assembly.

M. Kean, contra, contended, that the plaintiff had no lien on the building, because the lumber was not used in its construction.

(a) 7 Vol. Bioren's ed. L. P. 480.

The COURT, HEMPHILL PRESIDENT, gave the following charge to the jury.

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WALLACE
against
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This question arises under the act of assembly made to secure to mechanics and others, payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia; the words, so far as they relate to the present inquiry, are as follow: “all and every
“dwelling-house or other building hereafter constructed and
“erected within the city and county of Philadelphia, shall be
“subject to the payment of the debts contracted for, or by
“reason of any materials found and provided by any lumber
“merchant, for, or in the erecting and constructing such
“house, or other building, before any other lien, which
“originated subsequently to the commencement of the said
“house, or other building.”

You should consider this question as if it existed between Wallace and Melchoir; for, unless there had been fraud or collusion between the original contracting parties, we do not think it would be proper to take any other view of the case.

Was the debt contracted for and on account of the building; and was it delivered at, or near the premises, with an intention to be used therein? If it was, Wallace has done every thing to entitle him to his lien, and it would be hard to allow him to be defeated by any act of Melchoir's, in which Wallace had no participation.

If you are satisfied that Wallace's debt was contracted for, and on the credit of the building; and that the lumber was delivered at or near the building, at the place pointed out by Melchoir, with an understanding of the parties, that it was to be used in the erection thereof: if, after that, Melchoir did not use the lumber in the building, but, without the knowledge or consent of the plaintiff, sold it to other persons, still Wallace had a lien on the building, for his debt.

If there are other mechanics, who have liens, and the proceeds of the sale of the property is insufficient to pay the whole, they must be paid in proportion to the respective amounts: equality is equity; upon this construction the loss should be divided.

The jury gave a verdict for the amount claimed.

CASES
IN THE
Court of Common Pleas
OF
LANCASTER COUNTY.

1811.

SHENK against MUNDORF, et al.

None but the person in possession of the land, can maintain an action of trespass *quare clausum fregit*.

It is not a correct position that a new trial will never be granted, where the damages are merely nominal.

THIS was an action of trespass *vi et armis quare clausum fregit*, &c. tried the thirteenth of August 1802; a verdict was given for the plaintiff for six cents damages and costs of suit. It was argued, on a motion for a rule to shew cause why a new trial should not be granted.

The declaration stated, that the defendants were attached to answer the plaintiff, of a plea, wherefore with force and arms the close of the said plaintiff, (the same being an Island in the river Susquehanna,) in the said county of Lancaster, they the said defendants did break and enter, and thence did take and carry away, three hundred oak rails, of the value of thirty pounds, and other wrongs, &c.

Hopkins, in support of the motion, contended, that the plaintiff had *no possession* upon which to ground his suit; and, having sustained no damage, had no cause of action. There is no principle more familiar than that a man must have either an express or constructive possession, to support an action of trespass, *quare clausum fregit*. That, from the notes of the judge who tried the cause, it appeared, that for several years previous to the bringing of this suit, a certain

George Stoner was in the occupation of said Island, and in the enjoyment of the issues and profits thereof; that he (Stoner) must therefore be considered as the plaintiff's tenant *from year to year*; that if he were considered as his tenant only *at will*, the plaintiff could not support this action against the defendants, whilst Stoner's tenancy continued.(a) He further contended, that, as it appeared from the evidence given at the trial, that these rails were the defendants property, and were carried off and lodged upon the plaintiff's part of the Island, by the inundating of the river Susquehanna, the defendants were justified in following and retaking their property, in a *peaceable* manner, wherever it could be found. Upon the same principle, every man has a right to his recaption and reclamer; and more especially in this case, where the property appears to have been carried off by the act of Providence, which no one could control.

The maxim of law, "*actus DEI nemini facit injuriam*," in its principles so accordant with reason, and in its practice so applicable to human life, was therefore a complete justification to the defendants in this case.(b) And that a third ground, if necessary, would be, that the plaintiff had given no proof of property, the present action being brought for carrying away three hundred rails, without any evidence, at the trial, that they were the plaintiff's property.

It was answered by *Montgomery*, that the rails being on the plaintiff's land was sufficient proof of property, until the contrary appeared; and that wherever there was a contrariety of evidence, as in the present case, the jury were the exclusive judges. He admitted the general principle, that possession express or implied is necessary to support this action, but he had the misfortune to differ in opinion as to the facts. *Shenk* had certainly the *legal* possession; and even if *Stoner* were considered as his tenant *at will*, which was the utmost of his tenure, the plaintiff might, notwithstanding, well maintain the present action; because the possession of the lessee at will is the possession of his lessor. The lessor can even

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(a) 6 Com. Dig. Trespass, (B. 2) page 389.

(b) 2 Espinasse Dig. 86, 7. 6 Bac. Abt. Trespass, (F.) page 531.

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sustain an action of trespass against his lessee at will, for any injury done to the land; and he could see no good reason why he might not, upon the same principle, support an action of trespass against a stranger.^(a) Even admitting the rails were the property of the defendants, still they had no right thus to enter upon the plaintiff's premises, without having first obtained his permission. The defendants might have had recourse to their actions of replevin or trover, in either of which, upon proof of property, they would have regained the possession of their rails; there was therefore no necessity for the exercise of such a privilege, as the defendants contended for; and the practice of it *generally*, would be attended with ill consequences to the rights of individuals, and the peace of society. That, at any rate, the court will in no case set aside a verdict to exonerate a defendant from the payment of costs, where the jury only find nominal damages, as in the present instance.

PER CURIAM.

Franklin, President.

This was an action of trespass, *vi et armis*, for breaking the close of the plaintiff and carrying away three hundred oak rails; a verdict was rendered in his favor for six cents damages and costs of suit; and a new trial has been moved for on the ground, that he was not in possession of the land, on which the trespass is alleged to have been committed. It was proved, on the trial, before the late judge Henry, that the rails in question, had been swept off by a flood, and carried from one part of an Island in the river Susquehanna, to another part of it, where they were left upon a piece of land then occupied by George Stoner, but of which the plaintiff was seised in fee.

George Stoner testified, that he took the place of Charles Shenk (his father-in-law); that he had no lease for it, and must leave it whenever the plaintiff pleased; that he came to

(a) 6 Com. Dig. Trespass, (B. 2) page 389. Co. Litt. 57. a. 1 Haw. P. C. Forcible entry, &c. ch. 64, sec. 38, page 284. 1 John. Cases 124.

the land in the year 1790; that in 1791, he took the whole tract, excepting a part which the plaintiff had let to another person with the ferry; that the plaintiff lived in Mortick, about four miles from the Island, and had resided there for nineteen years; that the witness paid no rent, but took the whole proceeds to himself, except a trifle in grain, which he occasionally gave to the plaintiff when he asked him for it. He added, that with the consent of his father-in-law he had under-let part of the land, and had received rent in work; that he paid the taxes on the place, so much for the plaintiff, and so much in his own name.

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There was no contradiction of the testimony given by this witness, but it was contended by the counsel for the plaintiff, that, Stoner being merely a tenant at will, the lessor might well maintain this suit: It was also urged in opposition to the motion for a new trial, that the court ought not to grant it, when the verdict is rendered for so small an amount in damages.

We do not think it necessary to determine what estate Stoner had in the premises. The law is settled by numerous decisions, that none but the person in possession of the land, can maintain trespass *quare clausum fregit*. Whether Stoner then, were tenant for years, or at will, is not material. He had the sole and exclusive possession; and, for any damage done to the property during that possession, the plaintiff can obtain no redress in the present form of action. The authorities upon this point are all referred to and considered, in the case of Campbell against Arnold, in the supreme court of New York; (b) in which it was decided, that a lessor cannot maintain trespass *quare clausum fregit*, against a stranger, for cutting down and carrying away trees while there is a tenant in possession. In Tobey against Webster, (c) it was determined by the same court, that a lessor cannot maintain trespass *quare clausum fregit* against a sub-tenant at will of the lessee, for taking down and carrying away a house erected by him on the demised premises during the lease, on the principle

(b) 1 John. Rep. 512.

(c) 3 John. Rep. 468.

1811. that trespass will not lie by the lessor, or owner of the land, while there is a tenant in possession.

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There is no doubt, that an action of trespass will lie for a landlord against a tenant at will, for voluntary waste, as in cutting of timber;(a) but that is because the injury amounts to a determination of the estate, and the possession is considered as thereby actually in the landlord.

For an injury done to the inheritance by a stranger while the land is in the possession of a tenant, the landlord is not without his remedy. The law upon this subject is well laid down in Woodeson,(b) “as to wrongs immediately affecting real property of a corporeal nature, an action of *trespass vi et armis* is the proper mode of redress, provided the plaintiff has the present possession of the estate; but when his interest is only of the future, expectant kind, such reversionary proprietor may have an action on the case, and the other action, of *trespass vi et armis*, may also be maintained by the immediate occupier. As, if the owner or occupier of lands, contiguous to those of which I have the reversion, dig or make a fence in my close, in order to throw part of it into his own premises, my tenant in possession may have an action of *trespass vi et armis*, and I, the landlord, may have an action on the case, in respect to the damage done to my reversion.”

That a new trial will never be granted where the damages are merely nominal, cannot be a correct position, because an important interest may be determined, in a case in which the jury have given very trifling damages; and no verdict ought to be permitted to stand, by which the plain and obvious principles of law have been violated.

We are therefore of opinion, that the verdict is erroneous and ought to be set aside.

Verdict set aside and new trial ordered.

(a) Co. Lit. 57. a. 5 Co. 13. a. Cro. Eliz. 777. 784. 7 John. Rep. 4, 5.
(b) 3 Vol. 193, 4.

HEER *against* SLOUGH.

1811.

October 14.

THIS was an action of trespass *quare clausum fregit*, for breaking and entering the plaintiff's close, and quarrying, and carrying away stone, &c. It was tried, Feb. 7th, one thousand eight hundred and four; and a verdict given in favour of the plaintiff for seven hundred and ninety-six dollars and ten cents. A rule was obtained to shew cause why a new trial should not be granted, on the following grounds:

On a rule for a new trial the court rejected the depositions of witnesses, taken immediately after the trial, produced to explain and qualify the evidence they gave at the trial.

1st. The plaintiff has misconceived his action.

2nd. He gave no proof of possession.

3rd. The damages are excessive.

It was contended, that by the 9th section of the act entitled "an act for making an artificial road from the city of Philadelphia to the borough of Lancaster," passed the 9th day of April, 1792, the defendant had a right to enter upon the plaintiff's land, for the purpose of procuring stone and other materials for said road. This act was designed to effect an object of great public good; and provides ample security for all damages done to individuals, by securing to them an equivalent for their property. It never was contemplated, by the legislature, that this should be a case of vindictive damages. They merely intended, that every man who was thus obliged to give up a portion of his property, should have a reasonable price for it; and they prescribed an express mode of ascertaining that price, by appraisers to be appointed for that purpose. To maintain this action, therefore, would be to violate the provisions of this law. It would be extraordinary indeed, to punish a man as a trespasser, for doing what the law authorised.

There is another ground, however, upon which the action cannot be sustained; and that is, the want of possession. It was proved on the trial of this cause, that the plaintiff lived at the time, at the distance of twenty miles from the place where the alleged trespass was committed; and that Michael Young and Jacob Croner were his tenants. Young and Croner must therefore be considered as having a lease of this property, for a year at least. A lease for a year is a

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disposition of the property for that time; and having the exclusive possession, they alone, could support an action of trespass against a stranger. (a) Lastly, if there were no other reason, the court would grant a new trial on account of the excess of damages. The Legislature certainly never intended, even supposing the present form of action could be sustained, that a man should recover more by way of damages, than the value of his property and reasonable costs of suit; and yet the jury have allowed the plaintiff, not only the value of his property, but also, in addition to that, six hundred dollars, by way of damages.(b)

The counsel in support of the motion observed, that there was sufficient evidence even from the record, to satisfy the Court that the damages were excessive.(c) The determinations of juries are not final, and a new trial will be granted even in cases of *tort*, where legal principles have been violated, or the damages are excessive.

It was answered, That this is a common-law-suit, not intended to be taken away by the act of assembly. The legislature, it is true, contemplated, that individuals, residing contiguous to said intended road, should upon receiving an equivalent, relinquish a portion of their private rights. But they certainly never did intend to subject the property of individuals to the wanton abuse of others, without imposing some restraint upon their conduct. The law therefore, at the same time that it grants all the privileges necessary to effect its object, sedulously guards against the violation of private rights, by imposing proper restrictions upon the exercise of those

(a) 6 Com. Digest. Trespass B. page 389 390.

(b) That this was the fact, the counsel offered to prove by a paper, purporting to be the private finding of the jury, filed with the declaration, and indorsed by the clerk, "sealed verdict." This was objected to, on the ground that no evidence can be received upon the subject, other than the record itself. All private findings cease the moment the public finding is recorded; and if loose scraps of paper were permitted to influence or set aside verdicts, there would be no use in recording them: besides, there is no evidence that this was the finding of the jury, as it was not signed by them. The Court thought the objection a good one, and accordingly rejected the evidence. Another paper was then offered to the Court, said to contain the plaintiff's own estimate of damages, but which in fact was nothing more, than an offer made by him before suit brought. The Court rejected this also, and added, that an offer made and not accepted was not even evidence at the trial.

(c) 3 Black. Com. 390 l. Bays. Rep. 269 2 Black. Rep. 942. 2 Dall. 66. 2 Bay's Rep. 33. Styles Rep. 466 and Combuback 357.

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leges. In the first place, no one can even enter upon the lands of another, without having first given notice; and after he has entered, he dare not attempt to open the ground, until the price be fixed either by agreement with the owner, or ascertained by appraisers. The defendant therefore cannot seek protection under the provisions of this law, as he hath violated it, in its most essential parts. He gave no notice of entry; and after entry, made a wanton attack upon the plaintiff's property without his knowledge and consent, as if totally regardless of all those provisions and restrictions which were intended to secure the rights of individuals, and without which, what was designed as a public benefit, would have been an act of despotism. This act therefore being in derogation of common-law-right, must be construed strictly—every restriction in favor of the individual must be faithfully observed; for if a latitude of construction in one particular is allowed, where will it end? It at once substitutes the will of the wrong-doer, for the will of the law-maker. It subjects the owner to the will and pleasure of the trespasser; and obliges him to assume the character of a humble petitioner instead of representing him as a public benefactor. Every entry on the lands of another, against the owner's consent, is a trespass at common-law. To obviate this difficulty the legislature enacted, that before entry you must give notice; and therefore, if a man will undertake to enter without giving notice, and without consent, he becomes as much a trespasser, as if the act had never been passed.

Under all the circumstances of this case the damages are not excessive. The violation of public law and private right; the extensive and destructive nature of the trespass complained of, were all facts for the consideration of the jury; and in cases of *torts*, the question of damage belongs to them exclusively.(b)

There is no prescribed form of proving possession. It is generally supposed to be in the person to whom the land belongs; and where a man owns several tracts, he cannot have

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possessionem pedis of each. This is a technical exception and no ground for a new trial after verdict.(c) Moreover, Young and Croner, were not tenants of the farm, they were merely tenants of the plaintiff's mill and quarry.

That this was the extent of their tenure, was offered to be proved by their depositions taken the morning after the trial, which go to qualify the generality of their testimony as delivered to the jury.

To this it was objected by the counsel on the otherside, that a motion for a new trial can only arise upon the facts that were submitted to the jury; and to admit subsequent depositions would be attended with extreme danger, as it would open a door to perjury, and make that endless which was intended to be finite and certain.

The motion for a new trial, was supported by *Smith* and *Montgomery*.

Hopkins opposed it.

PER CURIAM.

Franklin, President.

This was an action of trespass *vi et armis quare clausum fregit*. It was proved, by Michael Young and Jacob Croner, witnesses produced by the plaintiff, that he lived in Little Britain, at the distance of twenty miles from the place in which the trespass was committed. They also said that they were his tenants. He was therefore not in the actual possession of the land, and agreeably to the decision of the Court in the case of *Shenk against Mandorf* he cannot legally maintain this action.

The counsel for the Plaintiff, with a view to remove this difficulty, has offered to read certain dépositions, taken immediately after the trial, to shew that the plaintiff was in

(c) 3 Wils 292. 2 Wils 306.

possession of the place; and to explain and qualify the expressions used by Young and Croner, that they were his tenants.

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On a due consideration of the nature of the testimony offered, it appears to me, that its reception, in the present stage of the cause, would be attended with such inconvenient and even dangerous consequences, as to justify me, upon every sound principle of law and policy, in refusing to admit it. I know that similar depositions have been sometimes received and acted upon by our courts, on motions for new trials. On this subject it is well remarked by Judge Brackenridge, in the case of *Blaines Lessee against Johnson*, (a) "that the propriety of hearing such depositions has never, he believes, received examination and that what has passed *sub silentio* in practice is very distinguishable from what has received the solemnity of a consideration on argument, and the sanction of decision."

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I am therefore of opinion, that there ought to be a new trial.

.Rule absolute.

AXERS, EXECUTRIX *against* MUSSELMAN.

1811.

October 14.

AN action on the case for money had and received, was tried and a verdict rendered in favor of the plaintiff. A rule to shew cause why a new trial should not be granted, having been obtained, it was argued by *Montgomery* on the following among other grounds.

1st. No profert was made of the letters testamentary. The objection was taken at the trial, and therefore it is not cured by the verdict. A man may sue, but cannot declare before probate—consequently the plaintiff having shewn no authority to receive, had no right to recover.

On a rule to shew cause why a new trial should not be granted, it was held,
1st That in an action brought by an executor or administrator, on a cause of action arising in the life-time of the deceased, no profert need be made of the letters

testamentary, or letters of administration; and 2ndly. It is no bar to an action for money had and received that a third person had entered into a bond to the plaintiff conditioned for the faithful collection and payment of the money in controversy.

(a) 3 Binney 103. 113

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 AXERS
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2ndly. Christian Musselman gave his bond to Barbara Axer for the faithful payment of all monies collected by his son Peter, the present defendant. This bond therefore destroyed all privity between Barbara Axer and Peter Musselman; and being a security of a higher nature, it extinguished the present cause of action.(a)

It was answered by *Hopkins* :

That the defendant by pleading the general issue, admitted that the plaintiff was executrix, and consequently there was no necessity to make proof of the letters testamentary. Want of proof, at most could have been used as a cause of demurrer, or made a matter of special pleading : and had the defendant's counsel thought it worthy of consideration, he, no doubt, would have made it a part of the record. It was considered as unimportant at the trial;—and being a subject traversable alone by plea; it forms no rational ground, for an application to the court for a new trial.

And with respect to the obligation given by Christian Musselman, it in no degree impairs the present cause of action. It was a mere collateral security designed to assist and strengthen, and not to destroy the present claim. It was not a security taken from the defendant, Peter Musselman, and therefore the case of *Toussaint against Martinnant* does not apply.

Per CURLIAM.

Franklin, President.

This was an action for money had and received by the defendant to the use of the testatrix in her lifetime, and on the pleas of *non assumpsit, non assumpsit infra sex annos*, and payment, the parties went to trial, and a verdict was rendered in favor of the plaintiff for one hundred and seventy three dollars and thirty three cents. This verdict has been objected to on two grounds : First, that the plaintiff was not entitled to recover without making proof of his letters testamentary. And Secondly, that Christian Musselman having executed a

(a) *Toussaint against Martinnant* 2 Term Reports 105.

bond to Barbara Axer, for the faithful collection and payment of the money in controversy by his son the defendant, limited her remedy to a suit upon that obligation and destroyed any right of action which she or her representative might otherwise have had against Peter Musselman.

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against
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The first objection is at variance with the doctrine laid down in 2nd Peake, (a) supported by the case of Mearsfield against Marsh; (b) that when an action is brought by an executor or administrator on a cause of action arising in the life time of the deceased and the defendant pleads only the general issue, it is sufficient for the plaintiff to prove the same facts which must have been adduced in evidence by the testator or intestate, had the action been brought by him. The plaintiff need not on this issue produce the probate or letters of administration to the jury, nor will the defendant be permitted to shew that they do not in fact exist.

It does not appear to me that the obligation entered into between Christian Musselman and Barbara Axer, in any degree affects or impairs the remedy, which she had against Peter Musselman. It is no more than a collateral security given in aid of, and in perfect consistency with, the right of action she might have on any express or implied engagement made by him. It gave her a two-fold remedy; one against Peter Musselman on the simple contract, the other against Christian Musselman on his special obligation.

I am therefore of opinion that there is no just cause for setting aside this verdict and that the rule to shew cause why a new trial should not be granted ought to be dismissed.

Rule discharged.

(a) 342-3. (b) 2 Ld. Raymond 824. Salk. 285 and 7 Mod, 141. and the authorities there cited.

1811. GALBRAITH to the use of BAIRD against ARCHIBALD ANKRIM and JAMES ANKRIM.

October 14.

A, having purchased land and given his bond in part payment, took a bond from the grantor and sureties to indemnify him from all incumbrances; On an action brought by the grantor on the bond given for part of the consideration, and under the plea of payment, and evidence given of the land being sold by judgments against the grantor, by which the consideration had failed, the court allowed the plaintiff to give evidence of a recovery on the bond of indemnity.

THIS was a suit on a bond dated the eleventh of August, one thousand seven hundred and eighty-five, conditioned for the payment of twenty-five pounds on the first of September one thousand eight hundred and one, and given in part of the consideration for a tract of land sold by James Galbraith to Archibald Ankrim. It was afterwards transferred to Joseph Miller and by Joseph Miller to John Baird, but the assignment not having been executed in the form prescribed by the act of Assembly the action was instituted in the name of the obligee for the use of Baird the present holder. At the time of the conveyance, the land was subject to several judgments, which were known to the purchaser who had taken a bond of indemnity executed by James Galbraith as principal and James Taylor and William Tweed as sureties, in the penal sum of two hundred and thirty-one pounds five shillings, to save him harmless and indemnified from all loss or damage which might accrue to "him on account of any judgments or mortgages then on record in Lancaster county against the said tract of land." The land was afterwards sold by the sheriff on one of those judgments. Archibald Ankrim commenced a suit against Galbraith and his sureties on the bond of indemnity, and on the second of May one thousand eight hundred, all matters in variance between the parties in the action being referred to arbitrators they made a report in favor of Ankrim for the sum of two hundred and fifty pounds.

On the trial of the above suit of Galbraith, for the use of Baird against Archibald and James Ankrim, it was agreed on behalf of the defendants that under the plea of payment they had a right to give in evidence a failure in the consideration—that the referees were confined by the terms of the rule of reference to a consideration of the monies actually paid by Ankrim and had no authority to decide any question involving the bonds in controversy and that therefore testimony offered to shew that they had included these bonds in their

award ought to be rejected. It was contended on behalf of the plaintiff and so held by the court that though, where a party buys lands which afterwards appear to be incumbered and suits are brought on bonds given for the purchase money, the law furnishes the defendant with a right to defalk to the extent of the incumbrance, yet that in this case the defendant had waved his legal right to defalk; and that evidence was admissible to shew that the arbitrators, in making up their award, and the defendant had since considered the amount of the bonds as still due to the plaintiff. A verdict was rendered in favor of the plaintiff for forty pounds thirteen shillings and seven pence.

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GALBRAITH
to the use of
BAIRD.
against
ARCHIBALD
ANKRIM and
JAMES ANK-
RIM.

A motion was made for a rule to shew cause why a new trial should not be granted on the ground that the opinion of the court was erroneous.

Montgomery on behalf of the motion contended that there was a total failure of consideration for the bond, and wherever that appeared, it has uniformly been considered as a discharge of the debt. In every contract there must be a consideration; otherwise it is a *nudum pactum*: and even if there be a consideration; yet, if that consideration fails, as in the present instance, it is tantamount to payment at law. The jury are bound to presume every thing as paid which, *ex æquo et bono*, in equity and good conscience, ought not to be paid.(a) And as want of consideration would have been a good defence against Galbraith, the obligee in the bond, it is equally so against Baird his transferee; the principle of law being well established, that an assignee takes the bond subject to all the equity which the obligor had against the obligee; at the time of the assignment.(b)

The counsel for defendant then stated, that true it was, Ankrim knew of the incumbrances on the land and took a bond of indemnity against them; which was afterwards put in suit, referred, and a report made in his favor for two hundred and fifty pounds. But the only subject submitted to the consideration of the arbitrators was the monies Ankrim had then actually paid; they had no authority to decide any

(a) 1 Dall. 260.

(b) 1 Dall. 233

1811.

GALBRAITH
to the use of
BAIRD,
against
ARCHIBALD
ANKRIM and
JAMES ANK-
ERIM.

other question, and the present bond formed no part of the subject of their consideration.

It must be apparent then to the Court, that if the present verdict be confirmed, the defendant will have to pay a debt for which he never received a particle of consideration. This will necessarily oblige him to seek his remedy over on the bond of indemnity : and why not, instead of turning him round, permit him to defalk his *equity* in the present suit? The law is clearly settled, that when justice can be done to the parties, circuitry of action is to be avoided ; (c) and in *Murray against Gray's administrator*, (d) the defendant was permitted to defalk a bill irregularly assigned, although no suit could have been brought upon it in his own name.

Hopkins, contra, admitted, that the law abhors circuitry of action, and that the assignee takes the bond subject to all and every equity ; But he submitted whether it would be equitable to permit a defalcation in this case, against John Baird an *innocent third person*, no way connected with the parties to the original contract. The case in *Binney* has no analogy to the present ; the question there was, whether the defendant could be permitted to defalk a single bill irregularly transferred, without any witnesses to the assignment. The court, very properly determined that he could ; because the assignment, though equitable, was a complete transfer of all the interest in it. Very different however, is the present case. Here the defendants have deprived themselves of the right of set-off, by their *own agreement* ; they became their own judges, abandoned all claim to redress by operation of law and equity, and stipulated for themselves, by taking a bond of indemnity with sureties. Had the case rested simply upon the original contract between the parties, it would have been otherwise ; failure of consideration might have been set up as a defence, not only against Galbraith, but all others claiming under him ; but the defendants in the present case, by entering into a distinct contract and taking a new

(c) *Turner against Davies*. 2 Saunders Rep. 150.
(d) 3 *Binney's Reps.* 135.

security, have disclaimed every idea of dependence on the original contract for redress. They had an alternative, either to accept of the remedy the law gave them, or to secure themselves by bond of indemnity or other security; having made their election, they must be bound by it; *expressio unius est exclusio alterius*.

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against
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ANKRIM and
JAMES ANK-
RIM.

Contracts affecting *innocent third persons* must be construed *literally*; they can receive no equitable construction; and where the parties take security, the law raises no promise. (a) Promises in law exist only where there is no stipulation between the parties. The defendants therefore having discarded the presumption of law by taking a bond of indemnity with sureties, must be content with that remedy which they have elected; they must have recourse to their bond of indemnity for redress; and, as *upon that*, no cross action can ever arise between the present parties, it would be injustice in the extreme, to permit Baird, an innocent third person, to be prejudiced *indirectly* by a set-off, where he could never be reached by any direct claim.

Per CURIAM.

Franklin, President,

There can be no doubt of the principle, that in a suit on a bond, in Pennsylvania, the defendant, under the plea of payment, may prove mistake, or a want of consideration; and that in such case the jury may and ought to presume every thing *to have been paid* which *ex equo et bono*, in equity and good conscience *ought not to be paid*. But I do not think that this principle is justly applicable to the present case. The plaintiff aware of the judgments and mortgages upon the property purchased, and not being willing to rely on the right of defalcation which the law gave him, took an express stipulation with surety to indemnify him from every incumbrance. When damnified he had recourse to his bond of indemnity against the principal and his sureties and obtained an award

(a) 2 Term Rep. 105. 1 Vern. 467.

1811. in his favor. He had therefore made an election of his legal

remedy from which he could not afterwards recede. The
GALBRAITH testimony offered was properly received; because it would
against
ARCHIBALD have been very unjust that he should be permitted to recover
ANKRIM and the amount of all the damages he had sustained and also to
JAMES ANK- withhold the money due upon the bond. I can discover no
RIM. legal objection to the opinion of the court, and think that
under the circumstances of the case, the verdict was correct
and ought not to be set aside. The motion for a rule to shew
cause why a new trial should not be granted, is therefore re-
fused.

Motion refused.

CASES
IN
The District Court
FOR THE
CITY AND COUNTY OF PHILADELPHIA.
DECEMBER, 1811.

CRESMAN and wife, against CASTER, executor of CASTER. 1811.

December 3.

IN this case a rule was granted, on motion of *Browne* and *Ross*, to shew cause why there should not be a new trial.

It was an action for work and labour done by *Mary Cresman*, for her father, in his lifetime; the services had been performed in the year 1772.

There was evidence, that about ten years previous to the testator's death he made an acknowledgement of the claim, and a few days before his death, he told *Mary*, that all his children should be paid their wages, after his death. He made other declarations to the like effect. The testator died on the twenty-fourth of December, 1797. This action was brought to March term, 1808. There was no acknowledgement of the plaintiff's claim, at any time after the testator's death.

The court, on the trial, were inclined in favour of the plaintiff, upon the merits; but in their charge, told the jury, that the act of limitations operated as a positive bar against any recovery.

A new trial was granted, the jury having found a verdict for the plaintiff, against the charge of the court, that the act of limitations operated as a positive bar against any recovery.

A testator, being indebted to one of his children, devised to her fifty pounds, to be paid at the expiration of ten years after his decease, and proceeded thus:

"It is my further mind and will,

that if any of my said children shall, after my decease, make any demand against my executors, for any services they may have done or performed for me, in my life time, then instead of the bequest mentioned to be given to such child or children, so exhibiting any such demand or charge, I give the sum of fifteen shillings a piece and no more."

In an action against the executor, by a child, for services rendered to the testator, and the statute of limitations pleaded, the court held, that the above clauses in the will did not prevent the act of limitations from running.

1811.

—————
 CRESMAN
 against
 CASTER.

The will of Caster was read in evidence; it was dated the sixteenth of January, 1792, was proved on the sixteenth of January, 1798; and contained the following clauses:

“ *Item.* I give and bequeath unto my daughter Mary, the wife of Philip Cresman, fifty pounds, in gold or silver coin, to be paid to her, at the expiration of *ten years* after my decease.

“ *Item.* It is my further mind and will, that if any of my said children shall, after my decease, make any demand against my executors, for any *services* they may have done or performed for me, in my lifetime, then, instead of the bequest mentioned to be given to such child or children so exhibiting any such demand or charge, I give the sum of fifteen shillings a piece, and no more.”

S. Levy and Hopkinson opposed the rule.

They contended, that after a verdict in favour of the merits, the court ought not to grant a new trial, merely on account of the act of limitations; and it was also urged, that the will gave the plaintiffs ten years to make up their minds, whether they would accept of the legacy, or make a demand for the services performed.

PER CURIAM.

Hemphill, President.

After stating the case.

In the first place it is to be observed, that this action was not commenced until upwards of ten years after the testator's death; so that the arguments of the plaintiff's counsel, on this head, will avail nothing, unless the act of limitations only began to run after the expiration of the ten years; which would allow the plaintiffs sixteen years after the testator's death, to bring their action. The court can perceive nothing in the will to prevent the act of limitations from running. The cause of action accrued in 1772, and the action might have been commenced at any time after the last acknowledgement; consequently, the act began to run from that period.

The object of the testator was not to give time, but to discourage his children from making any claim for services; and, as the plaintiffs do not come in under the will, but claim upon their original right, independant of the will, and in opposition even to the desire of the testator, they cannot derive any advantage from the will, the provisions of which they have rejected.

In the opinion of the court, the verdict is in direct opposition to the act of assembly, passed the twenty-seventh of March 1713, limiting the time for bringing of actions; and although the granting of a new trial is upon an application made to the discretion of the court, yet, it cannot be tolerated for a moment, that the court, in the exercise of that discretion, will ever permit the transgression of a positive act of the legislature.

The court direct the rule to be made absolute, on payment of costs.

Rule absolute.

1811.

CRESMAN
against
CASTER.

WALKER against LONG.

1811.

December 3.

ON the first day of January 1807, the plaintiff and defendant entered into copartnership in the business of tallow-chandlers, which partnership was to have existed three years.

The defendant generally kept possession of the books and made the entries, although there were some entries in the hand writing of the plaintiff.

An account between the parties, was stated by the defendant in a book, which was called "the expense book;" thus,

Dr. Matthew Walker,

1807,

June 25. To sundries brought forward,

§ 841. 01

they should think the form of action was wrong.

An application for a new trial is to the discretion of the court, and they possess the power of laying the party applying for the new trial under equitable terms.

An action for money had and received cannot be maintained by one partner against another, when the accounts have not been finally settled and a balance struck.

It is not clear, that in all cases, the court would be bound to grant a new trial, although

1811.

Contra Cr.

	1807,	
WALKER against LONG.	June 25. By sundries,	\$ 27 52 92 1-2
	Do. from do.	26 75
	26 Fat, lime and shovel,	51 21
		<hr/> \$ 28 30 88 1-2

This sum of \$ 28 30 88 1-2, was intended to have been carried forward to the credit of the plaintiff; these entries were therefore crossed, and at the bottom was written "*brought to the day book.*"

On the day book this sum was erroneously entered by the defendant, thus:

Matthew Walker, Cr.

26 June, 1807. By sundries (expense book,) \$ 23 93 01

Immediately underneath was the following entry:

Matthew Walker, Dr.

To sundries (expense book,) \$ 8 11 01

Making a difference of \$ 437 87 1-2, in favour of the plaintiff.

Sometime afterwards the parties disputed, and about the ninth day of January 1808, a division of the partnership property was projected; a statement of it on paper was made and afterwards an actual division of the property took place. The partnership was dissolved. On the twenty-sixth day of January 1808, an action was brought by the present defendant against the present plaintiff, for damages for not continuing the partnership for three years.

On the seventeenth day of February 1808, the suit was submitted to three referees.

Before the referees the present defendant claimed damages for the breach of the copartnership agreement.

The parties were irritable; the plaintiff in ill health.

The partnership books were produced, but they were badly kept and the referees did not understand them.

The referees advised the parties to take the books and produce them at the next meeting, together with a list of any errors they might find.

At the next meeting the plaintiff, Walker, produced a list of errors amounting to \$ 181 76 1-2.

1811.

Two of the referees having made up their minds to allow the present defendant \$ 700, for the breach of the copartnership agreement, they deducted from that sum \$ 181 76 1-2, which, leaving \$ 518 23 1-2, they awarded, in round numbers, the sum of \$ 500 damages.

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against
LONG.

To this report exceptions were filed.

On argument, the report was confirmed and judgment entered.

A writ of error from the supreme court was taken, and the judgment was affirmed; after which, the money was paid.

The present plaintiff afterwards discovering that the error of \$ 437 87 1-2 before alluded to, had taken place, brought an action of *indebitatus assumpsit* for money had and received to recover the amount.

The defendant pleaded *non assumpsit* and payment with leave to give the special matter in evidence; and gave notice that on the trial of the clause under the pleas of *non assumpsit* and payment with leave to give the special matter in evidence, he would give in evidence, “ that a certain action on “ the case, was brought by the said Long, against the said “ Walker, in the court of common pleas for the county of “ Philadelphia, to the term of March, A. D. 1808; and by “ consent of the said parties and order of court, the same “ was referred to James M. Alpin, Thomas Dobbins, and “ William Smiley, or any two of them, and that the referees “ having duly heard the parties, their allegations and proofs “ respectively; two of the said referees reported in favour “ of the said Long, in the sum of five hundred dollars, upon “ which report judgment was finally rendered in favour of “ the said Long; and further, that the referees with the consent and by the direction of the said parties, took into “ consideration the partnership accounts of the said firm, “ and all matters in variance between the said parties, and “ in their said report made a final settlement thereof.”

On this case *Condy* and *Hallowell* for the defendant made

1811. two points: First, that the submission and award were an absolute bar to the recovery.

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against
LONG.

Secondly, That the plaintiff could not recover in the form of *indebitatus assumpsit*.

On the first point, they said, that if the error had been discovered before the report was confirmed it would not have been a legal cause for setting aside the award, and therefore it could not be the subject of a subsequent suit.

That it had been decided in *Knox against Work*, (a) that the discovery of material evidence after the trial, which, by using due diligence, the party might have discovered before, was no ground for a new trial. And in *Marriott against Hampton*, (b) where under the compulsion of legal process, money had been paid by the plaintiff, to the defendant, which was afterwards discovered not to have been due, it was held, that the plaintiff could not recover it back in an action for money had and received.

They admitted, that provided the partnership accounts had never been brought before the referees, but that they had decided the question of damage *alone*, in that case, the award would not have been a bar to this action; but they contended, that as the sum now claimed was a portion of the whole partnership account, for another part of which the referees had given the plaintiff a credit, the award was a bar to the recovery.

In support of the second point they cited the case of *Ozeas against Johnson*, (c) which was an action for money had and received, brought by one partner against the other, to recover the proceeds of a partnership adventure, and the action was held not to lie. They also relied on the case of *La Malaine against Caze*. (d)

(a) 2 Bin. Rep. 582. 1 Browne 101.

(b) 7 Term Rep. 269.

(c) 4 Dall. Rep. 434. 1 Bin. Re . 191.

(d) *Circuit Court of the United States, April Session, 1812.*

LA MALAINE against CAZE.

This was an action by one partner, for money had and received against another, for a balance of a particular shipment, in which they were jointly interested. It was contended by the plaintiff, that the partnership was dissolved, and the defendant acknowledged what was the balance due.

By the court. Washington Judge. The law being admitted, there can be no doubt in this case, even if the evidence proved more clearly than it does,

By *Browne, Hopkinson, and S. Levy*, for the plaintiff, it was answered, that the claim of the plaintiff was founded on justice and equity, and the defence consisted of technical objections alone. That the general opinion of law was well settled, that wherever there was a mistake, either in law or fact, this action could be brought.^(a) That the real question in this case was not, whether the plaintiff *might* have been allowed this sum in the former action, but, whether the same cause of action *had been* litigated and considered in the former action. That this principle had been settled in the cases of *Seddon against Tutop*,^(b) and *Ravee against Farmer*.^(c) The former was an action of assumpsit, wherein the plaintiff declared, on a promissory note, and for goods sold and delivered; and upon a writ of inquiry, after judgment by default, he gave no evidence on the count for goods sold, but took his damage for the amount of the promissory note only; and it was the unanimous opinion of the court, that this was no bar to a recovery of the amount of the goods sold, in a subsequent action. In the latter case, all matters in dispute were submitted to referees, who made an award; and, upon a second suit brought between the same parties, the court admitted one of the two arbitrators to prove, that the matter then under consideration had never been laid before them by the parties, and that they had not taken it into their consideration in forming their award.

With respect to the second objection, they did not deny the law to be as laid down in the case of *Ozeas against Johnson*; but this was distinguishable from that case. *There the*

that defendant acknowledged the balance due the plaintiff to be \$1100, after deducting the \$160; this is not a balance upon a settled account, for, to constitute such an account, all the parties must consider it. All must be bound by it, or none are. This consent must be either express or implied. I am inclined to think, that if, after dissolution, one partner was to state the account and send it to the other, who should by his conduct shew his acquiescence, by retaining it for a considerable time without objections, that he might be bound by such statement as well as the other, and that this action for the balance might be maintained. But, in this case, the plaintiff did not assent to the balance as stated by the defendant, but on the contrary claimed in this action more than the \$940, and much more than the jury supposed to be the original balance; which shows the balance was not struck so as to bind both parties. The action then cannot be sustained.

(a) 1 Salkeld 22. *Tompkins against Burnet*, 2 Wm. Black. Rep. 1.

(b) 6 Term Rep. 609.

(c) 4 Term Rep. 146.

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against
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parties had never settled their accounts, and that fact is relied on by the chief justice in delivering the opinion of the court; *here*, it was in evidence that the accounts had been finally settled and adjusted, and a division of the partnership property had been made. Why then, they asked, should the plaintiff be driven to an action of account render, when, except this one item of mistake, there was nothing to settle or account between the parties?

Per CURIAM.

Hemphill, President.

To the jury:

The present is a very important and delicate question, and one that demands your serious deliberation. It is essential to the peace and harmony of society, that there should be an end of controversies between man and man; when, therefore, there has been a trial in court, it *generally* is conclusive on the parties. It would not be sufficient for a man to say, that he had evidence, which he could produce, unless the evidence was not in his power or could not be produced at the time of the first trial.

In this case it is for you to consider, whether the mistake could have been discovered by due diligence on the part of the plaintiff; to the court, he appears to have been guilty of gross negligence, in not making the discovery. You have the right also to consider, whether it is not probable that the parties did adjust this item, at the private meetings that they had at the recommendation of the referees. As to the conclusive nature of the award, we will observe, that a party may join several causes of action, as for instance, two bonds, or two notes, or any other causes. But the bonds or notes would be *distinct* causes of action. Suppose, in an action on two bonds, under the plea of "payment," a mistake had been made; the parties could not have a reinvestigation of the cause, except under the limitation I have stated. So, when a case is submitted to referees, their award is binding on the

parties. If this case had been tried before a jury in the form of an action of account render, or in any other form, which would have tried the whole merits, we think it could not be again *over-hauled* in a subsequent action. The subject of the partnership accounts *generally*, was before the arbitrators, though it does not appear, that the particular item complained of came under their notice.

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If all matters in difference are referred to referees, and there are *distinct causes of action*, and only *one cause* is brought before the referees, the parties, in that case, would not be concluded; but this appears to furnish something different from that case; we cannot conceive how it could be placed in a more favorable point of view, as respects the plaintiff, than by supposing that he has omitted to produce material evidence on the trial, and then, the question recurs, has he made use of due diligence?

If you think the subject matter was before the referees, (which is a fact for you to decide,) we are of opinion, that their decision is conclusive.

On the second point, we have no doubt. The case in second Binney's Reports fully establishes, that money had and received will not lie between partners. I do not perceive how it is possible to distinguish this case from *Ozeas against Johnson*. Where, between partners, a balance has been struck, a suit will lie; but the plaintiff's action is founded on the supposition, that there was *no balance struck*. If we can, in this form of action, examine *one* item of an account, what is to prevent a party from bringing an action to try the validity of each item of the account, and thus, harass the defendant with a multiplicity of suits? The examination of *this item* involves the *whole account*; that is the reason, that it should have been an action of account render, and auditors should have been appointed. We are clearly of opinion, that this action cannot be supported, in its present form.

The jury gave a verdict for the plaintiff, for the sum claimed.

The court granted a rule to shew cause, why a new trial should not be granted.

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It was argued by *Condy* and *Hallowell* for the defendant, and *Browne* and *S. Levy* for the plaintiff.

The same points were taken and, the same arguments were urged by the respective counsel, with this addition, that the counsel for the plaintiff contended, that though the form of the action should be wrong, yet, if it clearly appeared that upon the whole no injustice had been done to the defendant ; or if it clearly appeared that the plaintiff could, by *another form of action*, recover all he had got by this verdict, the court would not grant a new trial.(a)

PER CURIAM. In this case, a Rule has been obtained to shew cause why there should not be a new trial.

The leading facts of the case are these : The plaintiff and defendant had been partners as tallow-chandlers; and it appeared in evidence, that they had entered into an amicable action wherein Long was plaintiff and Walker defendant, the object of which was to recover damages which Long had sustained, in consequence of the partnership being dissolved by Walker, contrary to the original intention of the parties. That action was referred, and the referees awarded five hundred dollars in favour of Long. The report was confirmed in the court of Common Pleas. Walker, the defendant in the former action, produced, by way of set-off, before the referees, the partnership accounts : Upon examination, the referees found a difficulty in settling them, in consequence of the confused state in which they appeared; and requested the parties to endeavour to correct the errors themselves. The parties, accordingly, corrected particular errors which were contained in a paper, returned by them to the referees, and agreed upon a balance of about two hundred dollars in favour of Walker; which sum was deducted, by the referees; from the damages which they considered that Long had sustained, leaving the sum of five hundred dollars the amount of the report.

Walker, the present plaintiff, contended at the trial, that there had been a mistake in the settlement of the accounts—

(a) 2 Bur. Rep. 936. Foxcroft et al. against Devonshire et al. 2 Wilson's Rep. 302. Goslin against Wilcock. Ibid 362. Slater against Baker. Wm. Black. Rep. 1221.

that in a book called "The Expense Book," the following credit was entered in favour of Walker.

1811.

20th June, 1807.—By sundries brought forward \$2830 88 1-2 ; and that on the 26th June, 1807, in carrying this credit to a book called the "Day Book" it is entered for a less sum, viz. for \$2398 01 cents.

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The mistake was said to consist in the difference of these two sums : the counsel for defendant objected to the demand of the plaintiff, on three grounds :

1st. That no mistake had taken place.

2ndly. That the plaintiff was concluded by the former recovery and judgment.

3dly. That if any thing was due to the plaintiff on the partnership accounts, it could not be recovered in an *assumpsit* for money had and received, but in an action of account render, which was the only action that could be maintained, as no balance had been finally struck.

The Court charged the jury in favour of the defendant on the 3d ground; and will confine their present remarks to that objection, without saying any thing to prejudice the merits of the case.

The law, on this subject, was settled in the Supreme Court in the case of *Ozeas against Johnson*, administrator of *Foulk* ; (a) in that case it is said " that the money received
" during the partnership, by one partner is not received for
" the use of either of the partners, but of both of them; the
" proper remedy for one partner against the other, is by an ac-
" tion of account render. No case has been cited by the plain-
" tiff, to show that an action like the present can be maintained;
" unless the parties have settled their accounts and struck
" the balance : it is of importance, that the forms of actions
" should not be confounded ; they are founded on good
" sense and convenience; the defendant has an interest in
" insisting that the proper form of action should be preserved,
" of which this Court has no right to deprive him: it is most
" convenient that the partnership accounts should be settled
" before auditors."

(a) 1 Binney 191.

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In the case before the court, if the plaintiff is right in the justness of his claim, it is evident that the accounts have not been finally settled and a balance struck: that a balance has not been fairly struck, is what the plaintiff complains of; and until that is done, an action for money had and received cannot be maintained.

It has been contended, that after a verdict in favour of the merits, the Court will not turn the party round on account of the form of action; and that this case differs from that of *Ozeas against Johnson*, because in that case the point was reserved. The Court can perceive no substantial difference between a point being reserved, and where the party at the trial, insisted upon his right and obtained the opinion of the Court in his favour. If the Court persist in the correctness of their first opinion, they ought to consider themselves in the same situation as if the point had been reserved—it would be different if the objection had been raised for the first time, when the application was made for a new trial; but, notwithstanding a question has been reserved as to the form of the action at the trial, it is not clear that, in all cases, the Court would be bound to grant a new trial, though they should think the form of action wrong. In the case of *Satterwaite against Devonshire* (a)—the question, as to the form of action, was agreed to be reserved as a point for the further consideration of the judge who tried the cause; in that case a new trial was granted on another ground, but in regard to the form of action Lord Mansfield says, “That though the ground of the verdict should be wrong, yet if it clearly appeared to us *now*, that upon the whole no injustice has been done to the defendant; or if it clearly appeared to us *now* that the plaintiffs, by another form of action, could recover all they have got by this verdict, we think the Court ought not to grant a new trial. But if injustice be done to the defendants by the present verdict; and if it be not certain and clear that the plaintiff might have equal redress, and recover as much by another form of action, then we ought to grant a new trial.” In the case of *Welsh against Duser*, (b) an objection was taken at the trial to the form of action, and the point reserved for consideration in

(a) 2 Bur. Rep. 936.

(b) 2 Bin. Rep. 336-7.

bank ; yet the court did not grant a new trial on account of the form of action, but upon other grounds, I find annexed a condition that the defendant should try the cause on its merits, without objecting to the form of action or to the declaration—the case now under consideration, however, comes clearly within the determination of the Supreme Court, in the case cited of *Ozeas against Johnson* administrator of Foulk, which decision this Court consider as decisive of the present question. In granting a new trial, the application is made to the discretion of the Court; and it is in the power of the Court to lay the party applying, under proper equitable terms. This power should always be used to prevent the plaintiff, if possible, from being turned round, which can only occasion delay and additional expense. In this case the Court grant a new trial, on condition that the defendant consent that the form of action be changed to an action of account render, and that the costs of the former action abide the final event of the cause. The court are aware that they have gone further than they are warranted by any precedent ; but they think, not further than they are justifiable in their discretion upon the subject of a new trial.

1811.

WALKER
against
LONG.

FIFE *against* KEATING.

1811.

December 3.

A *capias*, in trespass, was taken by William Fife *against* William Keating and Michael M'Dermott, to June term 1811, by virtue of which, both of the defendants were arrested, and held to bail in one thousand dollars. Keating was a freeholder, but M'Dermott was not.

On motion of Randall, for Keating, a rule was obtained to shew cause why the writ should not be abated, pursuant to the third section of the act of assembly of March 20, 1724-5. (a)

If a freeholder joins with one who is not exempted from arrest, in the commission of a joint trespass, the court will not abate a writ issued against them jointly.

(a) 1 Vol. Bioren's ed. L. P. 206. 1 Smith 164.

1811.

FIRE
against
KEATING.

Browne, for the plaintiff, maintained, that Keating, by having associated himself in the trespass with M'Dermott, who was not a freeholder, had forfeited his privilege.

After argument, the Court gave the following opinion.

Per CURIAM.

Hemphill, President,

In this case, the question is, whether a freeholder, who commits a joint trespass with one, who is not a freeholder, can be arrested, upon a joint *capias* issued against them?

It is agreed, that no notice was given to enter special bail; and that the freeholder does not fall within any of the exceptions of the act of assembly, passed the 20th of March, 1724-5.

The Doctrine of privilege, in England, was urged as applicable to our act of assembly.

In England, certain officers of the court are allowed particular privileges, in respect of their necessary attendance in courts; they are regularly, to sue, and be sued, in the Court to which they respectively belong; and cannot, except in certain cases, be impleaded elsewhere. This privilege is founded on ancient usage and custom. If a privileged person there had joined with another, in a *debt*, or other *joint contract*, he thereby lost his privilege; upon this point, the decisions are uniform; but, where the action might be severed, much diversity of sentiment appears to have existed; and cases are to be found both ways. In 14 H. 5, 21. b. it is said, if an action be brought against two, and the action may be severed, then, if one be a clerk in chancery, he shall have his privilege. In 20 H. 6. 32 b. this is doubted; and it appears, from other cases, that the rule is general, and, that a plaintiff, in trespass, is not bound to bring separate actions. The court are of opinion, that a similar construction put upon our act of assembly, would not be an unreasonable one. It cannot be contended, that a privilege can

be gained, by joining with a privileged person. If a freeholder, therefore, joins with one, who is not exempted from an arrest, in a joint and several Bond, or in the commission of a joint trespass; in either case, he gives to the plaintiff a right to bring a *joint action*, or *separate actions*, at his election, and it will generally be more convenient for the plaintiff to attend to one, than to a number of suits. If there should be any improper practice, in joining a freeholder with a person not exempted from arrest, and *who was not a party in the trespass*, in order to defeat the freeholder of his privilege, the court, being well satisfied of this, can abate the writ, on motion. The Rule must be discharged.

1811.

FIFE
against
KEATING.

The Rule to shew cause, why the writ should not be abated, discharged.

FITLER *against* PROBASCO.

1811.

December 3.

TRESPASS—FALSE IMPRISONMENT.

On the 10th day of August 1809, a summons was issued by the defendant, Henry Probasco, then holding the commission of a Justice of the Peace, at the suit of Jonathan Edwards against George Fitler, the plaintiff. It was returnable the 15th of the same month, at 9 o'clock, A. M. At the return of the summons, it appearing, that it had been regularly served, the Justice, on the oath of Edwards entered a judgment for seventy-five cents. On the same day Fitler appeared and claimed a hearing, alleging, that he was aggrieved by the judgment: the Justice then appointed for hearing the 20th of August; at which time the parties attended, and the Justice confirmed his judgment for the seventy-five cents, and

If a Justice of the peace has a right to commit for contempt, it can only be for a contempt committed while in the execution of his office in his JUDICIAL capacity.

1811.

FITLER
against
PROBASCO.

costs. The demand appeared to be for breaking a table. On the 23d, the Justice issued an execution for the debt, together with one dollar and seven cents costs, the particulars of which were not specified. This execution was placed in the hands of James Shillingsford, one of the constables of the Northern Liberties, to be served. The same day, Shillingsford shewed the execution to Fitler, who requested a bill of the particulars of the costs; this the constable said he was unable to give, but referred the plaintiff to the Justice, to whose office the plaintiff immediately repaired. When the plaintiff arrived at the office, the Justice had just been engaged in paying a person a small sum of money recovered before him; and he and the person were conversing on political subjects. Fitler, addressing himself to the Justice, said, "what sort of a damned execution is this you have sent me." The magistrate took down his docket, and opening it, said "we will see." Something was also said by Fitler, respecting the costs, and its being a *lump job*; but no bill of particulars was at that time given. Fitler went out of the office, and the Justice following him to the door threatened to put him in Jail, to which Fitler replied, "as nice a looking man as you are, you can't do it, nor any one like you." This interview took place about noon. In the afternoon, the Justice calling in a constable, who was passing by, wrote the following commitment and gave it to him to serve:

COUNTY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

" To any constable, and the keeper of the jail of the City
 " and County of Philadelphia.

" These are to command you the said constable, forth-
 " with to convey and deliver into the custody of the said keep-
 " er of the said Prison, the body of George Fitler, of said
 " county charged before me for contempt of office, this
 " 23d August. And you the said keeper are hereby re-
 " quired to receive the said George Fitler into your custody
 " in the said prison, and him there safely to keep, for twelve

DISTRICT COURT, &c.

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“ hours, or until he shall thence be delivered, by due course
“ of law. Hereof fail not, as you will answer for your con-
“ tempt at your peril.

1811.

“ Given under my hand and seal this 23d day of August
1809.

**FITLER
against
PROBASCO**

(Signed)

**HENRY PROBASCO,
Justice of the Peace.**

The constable, after arresting Fitler, on the warrant of commitment, returned to the justice, and inquired if he would take bail, and offered to go for Fitler's father, who was a man of estate and respectability. The justice replied, that he would take no bail; and if his father or any one else should treat him with the same contempt, he would send him to jail. The constable returned to Fitler, and conducted him to prison. On their way thither, he was allowed to have an interview with his counsel; he appeared to be much affected, shed tears, and said he was the first of the name, who had ever been in jail. The same afternoon, the magistrate sent a written discharge for Fitler. He was in custody altogether four hours; about two hours of which time he was confined in the watch room in the prison.

The cause was tried by *Browne, J. Sergeant* and *S. Levy*, for the plaintiff, and

By *Wm. Milnor* and *J. R. Ingersoll*, for the defendant.

The following is the charge to the Jury :

Per CURIAM.

Hemphill, President.

It has been contended by the plaintiff's counsel, that the arrest by virtue of the commitment, was a violation of personal liberty, and unwarrantable by the constitution and laws of Pennsylvania: that a justice of the peace has no authority, in any case, to inflict a summary punishment for a contempt;

1811.

FILLER
against
FRANCISCO.

that the power of a justice of the peace is two-fold; first, that, which he derives under his commission as a justice of the peace, strictly speaking; and secondly, such civil jurisdiction as has been vested in him by the legislature, at different times; and that in neither capacity does the power exist.

That in England a justice of the peace does not possess the plenitude of power; and even if it did exist in that country, the exercise of it here was prohibited by the eighth and ninth section of the ninth article of the constitution.

[The court here read the eighth and ninth section of the ninth article of the constitution.]

By virtue of these sections it has been urged, that no citizen can be deprived of his liberty, except upon probable cause, supported by oath or affirmation; and that, in all cases, he is entitled to a trial by jury. This construction, upon the broad ground contended for, the court think cannot be correct. The constitution was only intended to be applicable to cases of criminal prosecution by indictment or information, and not to embrace (to say the least) such a contempt as may be committed in the face of a court of justice; the most zealous advocates for the opposite doctrine have never gone further than to restrain the courts from punishing, summarily, for *constructive* contempts.

If the constitution stands, in all cases, as an insurmountable barrier against this summary mode of punishing for contempt, then, neither branch of the legislative body could commit for the grossest insult offered to their dignity, or for the actual interruption of their most serious deliberations; in that case also, the supreme court, the highest judicial tribunal in the state, could not inflict immediate punishment for any contempt whatever, committed in the presence of the court: upon the same principle the act of the third of April 1809, would be unconstitutional, for the legislature itself is bounded by the constitution, and cannot overleap any of its provisions.

The court are of opinion, that the constitution opposes no obstacle in the way of punishing summarily, for such contempts as are committed in the face of those, who are

appointed to administer justice, and which may have a tendency to obstruct their proceedings. The question therefore will always be, whether the persons exercising such powers are possessed of it by the *law of the land*; for the legislature can unquestionably give such a power, either to arbitrators or to a justice of the peace.

1811.

FITLER
against
PROBASCO.

In this case the first and general question is, has a justice of the peace, in any case, a power to punish summarily for a contempt?

Secondly, If he has the power, is it not to be confined to a contempt, committed when in the actual execution of his office, and when acting in his *judicial* character?

The court will make some observations on the first point, but they do not feel it their duty, in the present case, to give any express opinion upon it.

By the first section of the fifth article of the constitution, a portion of the judicial power of the commonwealth is vested in justices of the peace; and from their number and the extent of their jurisdiction, they compose an important branch in the administration of justice; yet it has not appeared to the court, that their power to punish summarily for a contempt, has ever been recognized by any judicial decision in Pennsylvania: perhaps this is the first time that the question has ever been seriously discussed in any court of justice in the state.

It may with propriety be asked, why justices of the peace should not possess this power, as the administration of justice ought not to be subject to greater interruption before them, than in a superior court. It would occasion some difficulty to give a satisfactory answer; still, it is true that from the manner in which business is usually transacted *before them*, they are more likely than the judges, to be involved in personal altercations with the parties and their witnesses; and by that means their passions might be unwarily excited; and their judgments more liable to be biassed on the particular subject of disrespect towards them.

But the question recurs, do they, possess power? If they do, they have a right to exercise it; and no other court ought to interfere.

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 FITLER
 against
 PROBASCO.

If the power belongs to them, it must be derived from some act of the Legislature of Pennsylvania, or from some English statute, which has been extended to this state; or it must be considered as a power necessarily implied upon such principles of the common law, as ought to be obligatory upon the subject. There is no pretension, that it is derived from either of the two first sources, but that it originates from the latter; and to shew that a justice of the peace in England possesses such a power, several authorities have been read; the court will not now enumerate them; from some of the cases, it has been considered by the court and counsel as a matter granted, that such a power in England does exist; such of the cases referred to as have been examined do not fully support the position; no case has been produced, where the point was before the court and expressly decided, though such cases may exist; the court have not had time during the trial to make a thorough search. It is clear, that the law furnishes other means of punishing, than the one contended for; an indictment may be maintained, or the justice may bind the party over for his good behaviour, who commits a contempt; and if he will not find security he can commit him.

It must be admitted, that a justice of the peace in Pennsylvania, in consequence of the extent of his jurisdiction, has greater necessity for such an implied power, than a justice of the peace in England. It would nevertheless be most prudent to adopt one or other of the modes of punishment just mentioned, until the legislature shall think proper to define with accuracy the power of punishing for contempts.

The court here leave the first point.

As to the second question. If the power exists, it obviously arises from the necessity of the case, to repress any interruption in the administration of justice; and its exercise ought to be confined to the actual necessity, that gives rise to it. The act of the third of April 1809, restrains the summary punishment to the misbehaviour of any person in the presence of the court, *obstructing the administration of justice*. If the principles upon which this act is founded, should be adopted as the safest guide, and applied to the case of a

justice, the contempt must be such as to obstruct the administration of justice.

1811.

If a justice of the peace possesses the power contended for, the court are of opinion, that it can only be exercised, when he is in the *execution of his office in his JUDICIAL capacity*, and not when he is acting ministerially, as in allowing a poor rate, or in other similar cases.

FITLER
against
PROBASCO.

In this case, the administration of justice was not obstructed; the judgment had been previously given and the execution issued. The plaintiff only spoke to the justice concerning an act, which he had done, and not of an act which he was then doing; the justice, when the plaintiff came into the office, was conversing on the subject of *politics*; no litigant parties were before him, he was in the investigation of no cause, nor in the exercise of his judgment in any respect in relation to the duties of his office.

Under such circumstances the court are of opinion, that the justice had no power to deprive a citizen of his liberty, by a summary punishment.

As to the damages, you are the constitutional judges; they ought however to be estimated in a great degree by the opinion, which you entertain with regard to the motives of the justice.

The jury brought in a verdict in favor of the plaintiff **FOUR HUNDRED DOLLARS** damages, and costs.

BURK et al. against M'FALL.

1812.

January 29.

A Judgment having been obtained in this case, a *fiery facias* was issued to December Term, 1811; to which the sheriff returned, "levied, subject to prior executions." Without any sale of the property levied on, or any further proceedings on the *fiery facias*, the plaintiff issued a *capias ad satisfaciendum*, returnable at the next March term; by virtue of which, the defendant was arrested.

When a *fi fa* is returned "levied subject to prior executions" it is incumbent on the plaintiff to compel a sale of the property, before he can issue a *ca. sa.*

1812.

BURK et al.
against
M'FALL.

Lewis, for the defendant, now moved to quash the *ca. sa.*

When a *ca. sa.* is returned "*non est inventus*," a *fi. fa.* may issue; or a *ca. sa.* may be taken, after a return of "*nulla bona*" to a *fi. fa.* : so a *fi. fa.* or *ca. sa. pro* residue may issue; but when a *fi. fa.* has been levied, however inconsiderable the property levied on in proportion to the debt, no *ca. sa.* can legally issue, until it *judicially* appears, that the plaintiff's debt was not satisfied.

James S. Smith, contra.

The broad principle of law, that no man shall have the *benefit* of two executions at the same time, is the only one which the Court will regard in the present instance; there is nothing to prevent us from *taking out* two executions even to the same term. Have we received any *benefit* under the *fi. fa.*? this is the simple question; and it is incumbent on the party, applying to have the *ca. sa.* quashed, to maintain the affirmative of the proposition. The return to the *fi. fa.* over which we had no control, shews that the property is far from being unembarrassed.

PER CURIAM.

Hemphill, President,

The Court are of opinion, that the *fi. fa.* and *ca. sa.* ought not to be both in existence, and in operation at the same time; the first should be disposed of, in some way, before the second can be executed: They may be *taken out* together but cannot both be *served*. The act of assembly of the 18th of April 1807, does not alter the law in this respect. Notwithstanding that act, the plaintiff may, at his peril, issue a *ca. sa.* in the first instance. When a *fi. fa.* is returned "*levied, subject to prior executions*," it is incumbent on the plaintiff, before he can issue a *ca. sa.* to compel a sale of the property levied on, in order to put a judicial termination to the first writ.

The *ca. sa.* issued in this case must be quashed.

1812.

Rule to shew cause why the *ca. sa.* should not be quashed, absolute.

BURK
et al.
against
M'FALL.

THOMAS against HOPKINS.

February 15.

A *Capias* was issued on the twelfth day of December one thousand eight hundred and eleven, returnable to the ensuing March term. On the same day, and before the writ had been served, the plaintiff entered a rule of reference, pursuant to the directions of the act of Assembly of the twentieth of March one thousand eight hundred and ten. (a)

The Court refused to strike off a rule for arbitration, which had been entered by a plaintiff in an action, commenced by a *capias*, before the writ had been served,

Hopkins and *S. Shoemaker* for the defendant obtained a rule to shew cause why the rule of reference should not be struck off.

They contended, that the action was not *entered*, within the meaning of the first section of the act, until the return of the writ.

To discover the intention of the legislature, it was necessary, not only to examine the whole tenor of the act under consideration, but to advert to the prior Laws on the subject of Arbitrations. By the second section of the act of one thousand eight hundred and six, the plaintiff and defendant, either in vacation, or term time, might consent to a rule of Court for referring their cause, in all cases where an action had been, or thereafter might be *depending* in Court, or an amicable suit was or might be *entered*.

By the first section of the act of the 29th March one thousand eight hundred and nine, (b) either party was authorised to enter the rule, in all civil actions or suits *brought*, or which *might be brought*, &c.

Then follows the act of one thousand eight hundred and

(a) Purdon's Dig. 12.
VOL. II. No. I.

(b) Ibid 9

18'2. . ten, which declares, that it shall and may be lawful for either party, &c. to enter a rule of reference in all civil suits or actions *pending*, or that might thereafter be brought.

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against
HOPKINS.

So far the acts do not materially differ ; and it is plain to be perceived, that the words, recited from each of them, were intended as a description of the *kind* of action that might, or should be the subject of a reference. That these words were intended for this purpose *only*, is further apparent from the exceptions that afterwards follow : namely, “ excepting appeals to the Register’s Court, or issues directed by the said Court.” Experience had proved that these appeals and issues were not proper subjects of reference.

In the two first acts, no time was mentioned, after which the rules might be entered ; it was, no doubt, to remedy some inconvenience that had arisen under the practice of the second law, that the act under consideration proceeds to say, that it may be done, “ at any time after the *entry* of such suits or actions. That the Legislature were aware of the distinction between *bringing a suit* and *entering an amicable action*, cannot be denied, for they have made use of both expressions. That, in all cases of *suits brought*, they did not consider the action as *entered* until the return of the writ, may be collected from several expressions in the act.

In the first place, in the 11th sec. they give an appeal to the court in which the cause was *pending* at the time the rule of reference was entered. Now, whatever doubts may exist as to the meaning of the word “ *entered*,” there is none with respect to the word “ *pending*,” which implies that the cause is in court ; yet, according to the doctrine contended for by their opponent, there might be no action *pending* at the time the award was made.

In the next place, the 10th section authorises a judgment to be entered on the award ; which judgment, though it is to be entered by the Prothonotary, is, in legal contemplation, the act of the *Court* ; and cannot be pronounced, until the parties are judicially before them.

Sergeant, for the plaintiff, said, that in order to give a fair interpretation to the act of Assembly, it was not so essential to examine the words used by the legislature, as to

consider the design of the whole act. The framers of this law had principally in view, to facilitate the trial of causes, so as to enable a party to proceed without the agency of an attorney. The attainment of this object, required the aid of the Court in two particulars only. First, to commence the suit; and secondly, to enter judgment on the award; and both these acts the Prothonotary is empowered to perform.

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against
HOPKINS.

In England, where the original writ is purchased out of Chancery, a cause cannot be said to be *depending* in the Common Pleas, until the return; but here, where the writ issues out of the same Court to which it is returnable, it is *lis pendens* from the time of the purchase of the writ. The Court having possession of the cause, does not depend upon the return of the writ, but upon the appearance of the defendant; which might not be until the third term; at which time, the act of assembly says the rule shall not be entered. Thus the provisions of the law might be wholly defeated by a refusal of the defendant to enter special bail.

In the case of *Hertzog against Ellis*, (a) the point was decided: at the time that case came before the Supreme Court, the Legislature was in session; if their meaning had been misconceived, they would, no doubt, have passed a supplement to the act.

The Rule to shew cause why the rule of reference should not be struck off was discharged.

Rule discharged.

(a) 3 Bin. Rep. 209.

1812.

YOUNGHUSBAND *against* JAMES.

In the settlement of an account here, between a principal and his agent, the agent was allowed for certain advances supposed to have been made in England. The principal was afterwards obliged to pay the same sums in England, they never having, in reality, been paid. At the time of the allowance, the rate of exchange between England and this country was about par; but it had considerably fallen when the principal made the payments. The court confirmed an award of referees allowing the principal, the amount originally charged with interest.

CAPTAIN George Younghusband was the owner of the British Brig Hero: proposing to make a voyage to St. Domingo, he applied to the defendant, John James, who made him advances for the purchase of a cargo, for which he (James) was to be compensated by a commission. James also caused various insurances to be made on the vessel, cargo and freight; he advanced some of the premiums and held all the policies as security for the general balance. These transactions raised an account between him and Captain Younghusband.

The vessel was lost on the voyage and captain Younghusband returned to the United States and soon after died. James took out letters of administration. When he settled his administration accounts, he charged in it an item as a balance due to him upon his private account, that is the account before mentioned.

His administration account was referred to auditors, who were of course obliged to examine and settle the private account, in order to ascertain the balance to be debited or credited to the estate.

The auditors made report on the 27th January, one thousand eight hundred and ten; and, by a deduction in the commission charged by James, brought him in debt to the estate of captain Younghusband about the amount of his deduction, which he soon after paid.

Among the items admitted in James's account, were two for the payment of premiums for effecting insurances in Liverpool, as follows:

4th Mo. 30th, 1807—To amount of insurance effected in
Liverpool on Brig Hero - - - - - \$ 1353 40

8th Mo. 31—To amount of insurance effected
on Brig Hero and freight, in Liverpool 1021 82

These charges of premiums being allowed in James's account and his claims fully satisfied, the representatives of captain Younghusband became entitled to the policies of insurance, for effecting which these premiums were alleged to have been paid. James accordingly gave them an order upon Rathbone, Hughes & Duncan, his agents at Liverpool,

who had effected the insurance. Upon presenting the order, the agents refused to give the policies, alleging, that James had never paid them the premiums of insurance, for which he stood charged; and was, besides, indebted to them in a considerable balance upon their general account.

1812.

YOUNGHUS-
BAND
against
JAMES

The representatives of captain Younghusband, in order to get the policies, were obliged to pay Rathbone, Hughes & Duncan the amount of the premiums, which they did in June one thousand eight hundred and eleven. They therefore claimed from James the amount of the two items above stated, with interest, which had been allowed to him in account by the auditors, upon the supposition that he had in fact paid the premiums.

The items above stated were charged at the rate of exchange then current, which was about par.

Before the payment in June, one thousand eight hundred and eleven, exchange had fallen very considerably below par; and on this difference of exchange the whole question arose.

The representatives of captain Younghusband claimed the amount charged in account, with interest; and James contended, that he was only bound to pay the amount paid by the representatives in England, at the *now* current rate of exchange.

The cause having been referred, the referees awarded, for the plaintiff the sum of two thousand five hundred and fifteen dollars; being the amount of the two items charged in the account, with interest from the time of the payment in England.

To this Report the defendant excepted; and after a full argument on the question by *Sergeant* and *Binney* for the plaintiff, and *Hallowell* and *Hopkinson* for the defendant the opinion of the Court was delivered by *SOMMER*, assistant Judge, *HEMPHILL*, president, being absent, as follows:

When the representatives of captain Younghusband received the order from James for the policies of insurance in the hands of their agents at Liverpool, they expected the premiums had been paid, and that the policies would be delivered up to them, without having any thing to pay on their part. Captain Younghusband's estate had been charged with the premiums, and the amount allowed to James in the set-

1812.

 YOUNGHUS-
 BAND
 against
 JAMES.

tlement of his account by the auditors. Had the premiums been paid by James before his account was audited, there would have been no question made about the fall of exchange at the time he gave the order for the policies; or, had it been known by the representatives of captain Younghusband when they received the order from James for the policies, that the premiums had not been paid by him, and that a deduction could be claimed on account of the fall in the rate of exchange, they might have provided themselves with bills, and so have been saved from loss. But, as they had to pay the premiums unexpectedly in England, it would be hard that the estate of captain Younghusband should lose by the default of James. Besides, this money is now wanted in America, and not in England; and to allow James, the advantage of the fall in the exchange at present, would be giving him a premium for his default, at the expense of the estate of captain Younghusband, when it could be no longer benefited by bills on England.

The Court are therefore of opinion under the circumstances of the case, that the award of the referees should be confirmed, and do adjudge accordingly.

Report confirmed.

HOWARD against M'KOWEN.

A *scire facias* upon a mechanic's lien must, like an action of *assumpsit*, follow the nature of the contract; if one of several persons who ought to join in such *scire facias* brings

the action alone, the defendant may take advantage thereof upon the general issue. Where a declaration is in itself formal, the Court will not, at the moment of trial, allow a new and substantial count, changing the nature of the controversy, to be added.

Quere. If a *scire facias* is the proper remedy to recover the amount of a mechanic's bill when the lien is filed within two years from the commencement of the building, but after six months from the time of the debt contracted.

THIS was a *scire facias* upon a claim filed; and came before the Court, on a motion for a rule to shew cause why a *non suit* should not be taken off. The facts were these. Howard and Wharton furnished to the defendant, between the 8th of August one thousand eight hundred and eight, and the 30th of June one thousand eight hundred and nine, a quantity of lumber which was used in the construction of a house in

the city of Philadelphia. After the 30th of June, one thousand eight hundred and nine, the partnership of Howard and Wharton was dissolved, and all the rights and debts of the firm were, by an award of referees, made over to Howard. On the 8th of January one thousand eight hundred and ten, a claim was filed, agreeably to the Act of Assembly, against the house, in the construction of which, the lumber was employed. Two objections were raised at the trial.

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HOWARD
against
M'KOWEN

First, as the claim was filed after six months, (although within two years from the commencement of the building) that the remedy should have been a personal action against the debtor, and not a *scire facias* on the lien.

Secondly, as the lumber was furnished by the firm, the lien should have been filed and the action should have been brought in the name of both partners.

Green, for the plaintiff. The first question arises under the lien laws of one thousand eight hundred and six and one thousand eight hundred and eight (*a*). The first division of the first section of the act of one thousand eight hundred and six, enacts, "that every building shall be subject to the payment of the debts contracted for materials &c. furnished for constructing the same." The second division restricts this liability to two years, but with two exceptions;—first, when an action has been instituted; secondly, when a claim has been filed, within six months from the furnishing of the materials. The fair construction of this act is, then, that the mechanic has a lien on the house for two years, *at all events*; but if a suit be instituted, or a claim filed, within six months from the furnishing of the materials, the lien continues forever. By instituting a suit, or filing a claim, within the six months, advantage is taken of the exceptions in the second division of the act, which limits the lien to two years; and thus, lets in the provision of the first division, which subjects the building to the lien forever. After the passage of the Act of one thousand eight hundred and six, a difficulty arose at the bar as to the proper manner of enforcing the lien, where there was no privity of contract between the workmen or

(a) Purdon's Abridgement 345, 346.

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material men and the owner of the building. The act of one thousand eight hundred and eight was passed to remove this difficulty; and provides, "that the person having a claim filed, may, at his election, proceed to recover it, by a personal action against the debtor, or by a *scire facias* against the debtor and owner of the house." The objection is, that a claim cannot be legally filed after six months; and, if that period elapses, the mechanic is driven to his personal action. But both the acts of one thousand eight hundred and six and eight, give a personal action against the debtor; and, as the action of the first act is expressly limited to the period of six months from the time of furnishing the materials—the allowance of the action by the second act would be superfluous, unless it referred to a period after the six months. The personal action and the *scire facias* are made contemporaneous, "may recover by personal action or by *scire facias*"—and as it is acknowledged, that a personal action may be instituted any time within two years,—and a view of both acts shews, that the personal action, noticed in the second act, must refer to a period after the six months, it follows, that the *scire facias*, by the acknowledgment of the defendant, may be commenced any time within two years; and by the construction of the two acts, after the six months. The remedies also continue as long as the right; and as the *scire facias* is the proper mode for enforcing the lien, the lien continuing, at all events, for two years, the *scire facias* must continue for the same period. The driving the mechanic to his personal action would, indeed, be defeating the very intention of the Act, which was to make the house a security for the debt: But the execution on such personal action issues against the debtor, and such property as he may have at the time of the execution; and not against the particular building on which the work was performed, or for which the materials were furnished, and which, in the mean while, may have passed from the seizen of the original debtor. Second objection; as the lumber was furnished by the firm, the lien should have been led and the action should have been brought in the name of both partners.—This may receive two answers.

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First, the objection would have been valid, if the defendant had availed himself of it by a plea in abatement ; but having pleaded to the action, he cannot now give it in evidence. The law upon this subject arranges itself under three heads. First, in all actions of case, if one of two joint partners, executors, or assignees of bankrupts, who ought to join to bring such action, sues separately, the defendant must plead the omission in abatement, and cannot give it in evidence (a.) Secondly, in all cases of joint contract, whether by writing or by parol, *ex quasi contractu*, if one only be sued, he must plead it in abatement (b). Thirdly, it is laid down in some of the books of practice “ That with respect to actions of *assumpsit*, if one of several partners brings the action, the defendant is not obliged to plead the omission, in abatement, but may take advantage of it on *non assumpsit*. Under this head, it is argued, that the present action is classed ; and the reason of the rule assigned, and relied upon by the defendant’s counsel at the trial, was, that the contract laid in the declaration, varied from the contract proved. But, it has been repeatedly decided, that a variance between the *probata* and the *allegata* is immaterial—and that the leaving out of one of the joint contractors, does not vary the contract. This is decided by De Grey, C. J. (c) on the ground, that the contract with partners is joint as well as several. *Dixon vs. Bowman* (d) was an action against two defendants, on a promissory note. In evidence, it appeared, that a third person had also signed it : it was objected, that this was a variance. But the Court said, that *the contract proved was the same as that laid*. So in *Evans and Lewis* (e), the same point was decided. The rule, though found in books of practice, has never come directly before the Court since *Rice vs. Shute* ; and the cases on which the rule is founded, were decided at a time when it was allowed to give in evidence the non-joinder of both defen-

(a) 1 Salk. Rep. 31, 290. 1 Modern Rep. 102. 177. 1 Sidderfin Rep. 420. 6 Term Rep. 766. 1 John. Rep. 471.

(b) 5 Burr. 2611. 2 Black. 696. 947. 1 Washington 9, 3 Cains 99, Watson on Partnership 431.

(c) Abbot vs. Smith 2 Black. Rep. 949.

(d) Mich. 1771. 1 William’s Saunders 291. c. d.

(e) id. Easter Term, 1794.

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dant and plaintiff. But *Rice vs. Shute* deciding, that the omission of a defendant must be pleaded in abatement, there is no reason, why the same principle should not be applied to the omission of a plaintiff. The reasoning of the Court is equally applicable to both; and proceeds upon the ground that there should be no distinction between assumpsits and torts, in which last it has always been held that omission of partners is but a plea in abatement. *Lord Mansfield*, "I think there is not any necessity to bring the action against both partners. To be sure, a distinction is found in the books, between torts and assumpsits. Many *non-suits*, much vexation, and great hinderance to justice have been occasioned by this distinction. All contracts with partners are joint and several; every partner is liable to pay the whole; in what proportion each should contribute, is a matter merely among themselves: It is cruel to turn a creditor round and make him pay the whole costs of a *non suit*, in favor of a defendant who is certainly liable to pay his whole demand" (a). The distinction between torts and contracts is done away (b). So also the language of *Lord Kenyon* in *Sedgworth vs. Overend* (c). An authority directly at war with the rule, is likewise to be found in *Com. Dig.* (d). "If one joint tenant, or one joint merchant brings the action, and it is not pleaded in abatement, no advantage shall be taken of it in evidence."

As the rule then is not grounded on the principle relied on by the defendant's counsel, and is hostile, at once, with the reasoning of the Courts and an express decision, so also, is it inconsistent

First, With Justice. "*In fictione juris consistit aequitas.*" The forms of the law should never work an injury; but substantial injury is inflicted on the plaintiff by not allowing him, after issue joined, to proceed upon the merits of the cause, but defeat him at the threshold, upon a mere matter of form. No advantage accrues to the defendant. In truth and honesty he owes the debt to Howard; a contract

(a) Burr 2613.

(b) Washington Rep. 9,

(c) 6 Term Rep. 279.

(d) Abatement (E. 13.)

with partners is several as well as joint ; and a payment to Howard would completely discharge the debt ; for a payment to one partner is a good plea against a recovery by the other (a).

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Secondly, With Convenience. There was a period when the defendant might have taken advantage of the omission. If he had pleaded it in abatement, the plaintiff would have known what he had to encounter at the trial ; he might have shewn the death of his partner, which would have vested him with the right of suing alone (b). But the defendant joins issue on the right ; and when the plaintiff is attending with his witnesses to establish the right, at this late season, he urges a plea of which the plaintiff was ignorant,—a plea of form, and one which can be of no advantage to him, but the advantage of delay.

Thirdly, With the nature of pleading. Every subsequent plea admits that there is no foundation for the preceding (c). After a plea in bar, as at present, the defendant cannot plead in abatement, unless for matter arising after the commencement of the suit (d). The defendant here has pleaded to the declaration, but it would be nugatory to plead to the matter of a Count where it is affirmed that the plaintiff has no capacity to sue. This objection merely defeats the present proceeding, but does not shew that the defendant is forever concluded, which is, exactly, the definition of a plea in abatement (d). Non-joinder of partners, is a plea not founded on the merits of the cause, but on the form of proceeding, per Lord Mansfield (e). But matter of form is for the advantage of the defendant, and an exception to form can never be taken but in abatement and if the defendant neglects to take his exception at the beginning of the suit, he is supposed to have waived it (f).

Fourthly, With policy and the Acts of Assembly. “*Inter est reipublice ut sit finis litium* ;” but objections such as this, tend to a multiplicity of suits, and instead of ending, prolong them. At all events, the Count may be amended under the

(a) Wash. Rep. 79.

(b) Carthews Rep. 170 Ld. Ray. Rep. 340.

(c) Chitty on Pleading 426.

(d) Id. 434.

(e) 5 Bur 2614.

(f) Kerby's Connect. Rep. 83.

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M'Kowen. Act of March the 21st, one thousand eight hundred and six, which deserves to be styled *omnipotent*, a title given (a) to the Statute of Jeofails of 17. Char. 2d. A bill in equity may be amended *at any time* for the special purpose of *adding necessary parties* (b). But the Act of Assembly is bottomed on the broadest principles of equity, and the present case is embraced, in every respect, by the provisions of the Act; it is an objection of form and not of substance; no injustice is done to the defendant; and in such case, the single question is, "Will the amendment tend to the furtherance of justice?" (c) The rule too, under which the objection is taken, is, with reference to former decisions and the principles of the law, termed "*incongruous*" by Watson (d) and its propriety and justice are controverted by Serjeant Williams, with a force of reasoning not to be withstood (e).

Secondly, the action is properly brought in the name of Howard alone; for although the materials may have been furnished by the firm, yet the present suit is not grounded on the original transaction, but on the lien, which has changed the nature of the debt. A lien is an additional security given by the law to him, who, at the time of laying it, holds the debt. It is analogous to giving a mortgage for a book debt. In such case, the *scire facias* would issue in the name of the mortgagor, without any reference to the parties to the account. Howard, at the time of entering this lien, possessed the debt; and between him and the *terre tenants* it was a new transaction. Besides, the only reason for which the plaintiffs are joined, is, because they have a joint interest (f); but in this transaction Wharton had no interest; and to have joined him in the action, would have been admitting his claim to a portion of what was to be recovered; and thus we should have suffered a loss without possessing a remedy.

Bradford, for the defendant, contended on the first point, that this suit being a *scire facias*, on a claim filed after the expiration of the six months from the furnishing of the materials; and more than two years having elapsed, computing

(a) 1 Ventris 100.

(b) 1. Bacon's Abrr. 170.

(c) Tilghman C. J. 1. Bin 370.

(d) Watson on Partnership 339.

(e) Vide William's Saunders 291.

(f) Brokes Abridg. Tit. Joinder.

from the commencement of the building to the time of trial, it could not be maintained:

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First. Because the lien law does not contemplate the filing of a claim after six months from the time of furnishing the materials; and this *scire facias* being founded on a claim filed after that period, fails with the claim. The act of one thousand eight hundred and six, provides, that the debt shall not continue a lien longer than two years, unless an action is instituted, or a claim is filed within six months: and the filing of a claim, at any other time, or in any other mode, is not mentioned or allowed in the act. The act of one thousand eight hundred and eight, when it mentions a claim, uses this language: "A claim filed *agreeably to the provisions*" of the former act; thus, not enlarging the powers of the former act, nor giving any reason for the argument of the plaintiff, that another mode or longer time for filing claims was within the contemplation of the Legislature, at the time of the passing of this act.

Secondly. The law does not give a lien upon the building, but for two years: and therefore, even if the law allowed the filing of the claim, after the six months, the duration of the lien could not thereby be extended beyond two years; and consequently upon such a claim, the trial must be had and the judgment executed within this period; for otherwise, the lien would be prolonged beyond the limit prescribed in the act. This *scire facias*, then, having issued on a claim filed after the six months, although within two years, yet all the proceedings under it not being completed within that period; the trial occurring after a lapse of that time, it follows, that the claim having ceased to be a lien, the *scire facias* being founded upon it, should cease with it.

On the second point. It is not pretended to say what the law ought to be, but what it is.

If the law were doubtful, arguments on its justice, convenience and policy, would have weight; but it is sufficient for the defendant that "*ita lex scripta est.*" By the plaintiff's own shewing, it appears that there is a marked distinction, between *torts* and *assumpsits*; and that in the latter case advantage need not be taken of the omission, in abatement, but

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that it may be given in evidence. Even Sergeant Williams acknowledges the existence of the rule, while he endeavours to prove its absurdity. The single authority which denies the rule, is to be found in Comyn's Digest, but that is not supported by the cases cited, and is expressly denied in the subsequent sentence.

Green, in reply.

The filing of claims after six months is accordant to the universal practice of the bar ; and the objection, that if the act allows such filing, it also requires that the action founded upon such claim should be completed, in all its proceedings, within two years, is repugnant to the principles of law and reason. The law, when it limits the period within which suits may be brought, never regards the termination, but the commencement of the suit, to know, whether a compliance has been made with its provisions. The suing out of a writ will save a bar of the statute of limitations.(a) A suit, although informally or irregularly commenced, will have the effect of preventing the operation of the statute.(b) If a suit be commenced within the time of limitation, and it be removed after the expiration of it, to Westminster, by *Habeas Corpus*, although the *Habeas Corpus* is the proper commencement of the suit, in the Court above, yet the plea of the statute is no bar.(c) And, even, where the writ and declaration disagree, it is only necessary to enter the continuances, to prevent the bar of the statute ; and in this way the suit may be continued, after the expiration of the time prescribed by the statute, even for seven years.(d) If the law had regard to the termination of the action, an unprincipled defendant might, by artful delays, defeat, in many instances, his creditor, as well as the provision of the law for the limitation of actions.

(a) 4 Bacon's Abridg. 481 (b) Ibid. 483. (c) Ibid. 481.
 (d) 1 Dall. Rep. 411, 414.

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Per CURIAM.

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As to the second point, the *scire facias* necessarily follows the nature of the contract ; and the plaintiff's must be the same as if a personal action, in *assumpsit*, had been instituted.

The distinction between actions of *assumpsit*, and actions of tort is well settled. In *assumpsit*, if one only of several persons, who ought to join, brings the action, the defendant may take advantage of it on *non assumpsit*; but in actions of tort, it must be pleaded in abatement. The learned author of the Notes to Saunder's Reports, acknowledges the settled distinction and the universality of the rule; although at the same time he questions its propriety.

With regard to the declaration, it is formal in itself; and to permit a new and substantive count to be added at the moment of trial, would often essentially change the nature of the controversy, and be pregnant with many inconveniences; it cannot with propriety be granted under the act of Assembly.

The Court say nothing as to the operation of the claim filed in the name of one of two partners, nor do they give any opinion upon the other points discussed.*

Let the Rule be discharged.

Rule discharged.

* Vide post Cornelius against Uhler.

CASES
IN THE
Court of Common Pleas,
OF
DAUPHIN COUNTY.

1812.

HUBER against SHARCK.

Replevin will lie against the vendee of the sheriff for goods levied on and sold by virtue of an execution.

IN an action of debt of Seyler against Lutz, the plaintiff recovered, and issued execution, on which thirty-six acres of grain in the ground were sold by the Sheriff, as the property of Lutz, and purchased by Sharck, the defendant in this replevin suit. After Sharck had reaped the grain, Huber, who claimed the grain as his property, brought the present suit for the grain. Sharck, at the service of the writ gave bond to the Sheriff; and on the third of March one thousand eight hundred and seven, put in his plea to the suit of “*property in himself.*” On the 4th of December one thousand eight hundred and seven, *Laird*, for the Plaintiff, Huber, moved to quash the replevin, as violating the law of the 3d of April, one thousand seven hundred and seventy-nine.(a)

Hopkins, against the motion made two points :

(a) Pardon's Dig. 251.

1st. Supposing this case to be within the act of Assembly, the motion to quash should have been made at the return of the writ.(a)

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The motion must be at the first Court. By the following clause of the law, "*at any time after the service, by the Court to which this writ is returnable,*" it was intended to authorise the quashing of an illegal replevin at any adjourned Court, provided one was held between the service and the regular term of the Court. And, moreover, by the words, "*Court to which the writ is returnable,*" is meant the term to which it was returnable.

2ndly. The act was made to exempt officers from a multiplicity of suits, in performing the duties of their offices, but not to prejudice the rights of any person; and in this case, although the law prohibits Lutz from replevying the goods, either in the sheriff's hands, or in the hands of the vendee of the sheriff, it does not prohibit Huber from replevying them when in possession of the vendee, Sharek.(b)

The law does not prevent a replevin against the first plaintiff, as in this case, against Seyler, who procured the taking of Huber's property. The sole object of the law was, that executions might be executed and the property levied on sold.* By the construction here put, this object is effected and the rights of all persons preserved.

Replevin must lie against the vendee of the sheriff, or against the plaintiff in the execution; for the right of individuals to the possession of the specific property should not be unnecessarily infringed. An action of trespass is often inadequate; for the property might, to him, be inestimable in amount, whilst the intrinsic value might be trifling. Replevin will not lie against the sheriff in any case; neither by the defendant whose goods are taken, nor by a third person who may claim the property: but third persons may have replevin against the plaintiff in the execution, or against the vendee of the sheriff.

(a) 1 Dall. Rep. 142. Ibid 156. 1 Browne's Rep. 95.

(b) Addison Rep. 301. 1 Str. Rep. 567,

* QUERE. If this be the object of law, can the preceding sentence be correct? that is, would Huber have been allowed to bring a replevin against Seyler? Would not such a replevin have prevented the sale?

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Laird, for Defendant.

First. By the law such replevins are declared void, and therefore all proceedings are so too, and the motion is never too late. The words "*at any time after the service, &c. to the court to which returnable*" means the court having jurisdiction, as in this case it means the court of Common Pleas; and the words "*at any time*" authorise the motion at any time during the continuance of the suit.

Secondly. It cannot be the sole object of the law to prevent an interruption of the sale; for if it were, then a defendant, whose goods are taken, might have a replevin against the vendee of the sheriff. The act extends to all cases of replevin for goods taken, in execution, as well when brought by the defendant in the execution, as by third persons; for the words are "*the owner of goods taken in execution shall not have replevin.*" Huber issues his replevin *as owner*; and for goods taken in execution, it is therefore void.

PER CURIAM.

Franklin, President.

This was a replevin, for a quantity of grain, returnable to September Term, one thousand eight hundred and six. The defendant claimed the property and gave bond. On the third of March one thousand eight hundred and seven, he filed the plea of "*property*;" the plaintiff replied "*property in himself.*" Issue was joined and a rule for trial granted.

The facts of the case appear to be these: an execution was issued by Peter Seyler against Henry Lutz, under which the grain mentioned in the replevin, and then growing in the ground of Henry Lutz, was levied on and sold to the defendant, Sharck. The whole crop was claimed by George Huber in virtue of a lease made to him prior to Seyler's execution. When the grain became ripe, part of it was cut and carried away by George Huber, and the remainder by the defendant Abraham Sharck. For that part of the crop

which came into the possession of Abraham Sharek, this replevin issued. On the 4th of December, one thousand eight hundred and seven, a rule was granted by the court, at the instance of the defendant, to shew cause why the replevin should not be quashed.

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It was urged by the counsel for the defendant, that this replevin being issued for goods taken in execution, was contrary to the provisions of the act of assembly, of the 29th April, one thousand seven hundred and seventy-nine, and therefore void. On behalf of the Plaintiff, it was contended, that this act had relation only to goods while in the hands of the officer by whom they were levied on, or taken, and did not extend to the case of a vendee or other person into whose possession they may have come since they were levied on and sold.

Some very respectable writers on the English law (a) have said, that the remedy by replevin, was confined to the case of an unlawful distress ; but that opinion has been since considered as unwarranted by authority; and it is now held that replevin will lie for any unlawful taking of a chattel, without reference or limitation to a distress. (b) In Pangburn against Patridge, (c) it is said by Judge Van Ness, in delivering the opinion of the Court, that if the question be considered upon principle, it is proper that this action should be maintainable, wherever there is a tortious taking of a chattel out of the possession of another. In Weaver against Lawrence, (d) it was decided, that there are no replevins in Pennsylvania either under the statute of Marlbridge or at Common Law, but only under the act of one thousand seven hundred and five, which directs, that “ it shall be lawful for the Justices of each county to grant writs of replevin in all cases whatsoever where replevins may be granted by the laws of England, taking security as the said law directs ; and making them returnable to the respective courts of Common Pleas in the proper County, there to be determined according

(a) 3 Blk's. Com. 145, 147. Co. Litt. 145. (c) 2 Crompt. pract. 222; 1 Sell. 240.

(b) 7 John's Rep. 140. 1 Schoales and Lefroy 327.

(c) 7 Johns Rep. 140. (d) 1 Dall. Rep. 156.]

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law.”(a) In the same case, it was adjudged, that a replevin lies in Pennsylvania, wherever a man claims goods in the possession of another.

Upon the general right to the benefit of a replevin, the Common Law of England has imposed this restriction, that it shall not be granted for goods taken in execution or by distress upon conviction before a magistrate. The executing a replevin in such a case, would be considered as a contempt of Court, because, by every execution the goods are in the custody of the law. The law ought to guard them; and in the language of the books it would be *troubling* the execution awarded, if the party on whom the money was to be levied, should take back the goods by a replevin.(b)

This principle of the Common Law has been incorporated into our act of Assembly of the 29th of April, one thousand seven hundred and seventy-nine. After reciting, that writs of replevin had been granted and issued for goods and chattels taken in execution, and for fines and penalties legally incurred and due to the Commonwealth, to the delay of public justice, and to the great vexation of the officers concerned in taking and levying the same, it proceeds to declare, that all writs of replevin, issued for any owner of goods or chattels taken in execution or by distress or otherwise by any sheriff, naval officer, city or county lieutenant, constable or collector of public taxes, or other officer, acting in their several offices under the authority of this state, are irregular, erroneous and void, directs, that they shall be quashed, that treble costs shall be awarded to the defendant, and authorises the Court to order an attachment against the clerk who knowingly makes out the writ.

This act does not appear to us to enlarge the provisions of the common law; and the reason on which it is expressly grounded, namely, “to prevent the delay of public justice, and the vexation of the officer concerned in the levying of executions, and the collection of fines and penalties due to the commonwealth,” applies in its utmost latitude to the interdiction of replevins for goods, only while they remain in

(a) 1 St. L. Smith’s Ed. 44. Dall. Ed. 59.

(b) Gilb. Rep. 2 Dub. Ed. p. 122—3. 1 Barnard, B. R. 110. 2 Str. 1184. Willes’s Rep. 672 N. B.

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the custody of the officer, under the seizure, and cannot be construed to extend to the case of goods afterwards coming into the hands of a purchaser. The inconvenience which would unquestionably result from permitting replevins to issue in the first of these instances, would not exist in the other. A vendee, at sheriff's sale, stands in the place of the defendant in the execution; he acquires no better title to the property sold, than the defendant himself had; and the service of a replevin upon him, occasions no delay of public justice, nor does it produce trouble or vexation to any public officer in the execution of his office. With respect to the suggestion, that a party, though deprived of his replevin, may still resort to an action of trover or trespass, it may be remarked, that in those forms of suit he could recover only damages; and we see no cause for precluding him from the only remedy, by which he may be enabled to recover an article of property more valuable in his estimation, than any amount in damages, which a jury might think proper to give him.

It was also urged on the part of the plaintiff in this cause, that whatever weight there might be in the defendant's objection to the form of action, he could derive no benefit from it, in consequence of his omission to bring it forward in due season. The sentiments which have been expressed by the court on the principal question, render it unnecessary to deliver any opinion upon this point.

We therefore think, that the exception to the plaintiff's suit has not been sustained; and the rule to shew cause, why the replevin should not be quashed, is ordered to be discharged.

Rule discharged.

CASES
IN THE
District Court
FOR THE
CITY AND COUNTY OF PHILADELPHIA.
MARCH TERM 1812.

1812.

WISTAR against WALKER.

March 7.

The nominal plaintiff, in an action brought for a book account which had been *bona fide*, and for a valuable consideration, assigned before the action was brought, was admitted as a competent witness, though he admitted that the assignment was made with an intention to open the way for his testimony.

ACTION on the case, in the names of John Wistar and John M. Price, surviving partners of William Wistar deceased, to the use of Charles Wistar against Sarah Walker, executrix of John Walker deceased.

Pleas, *non assumpsit*, *non assumpsit infra sex annos*, and payment; replications, *assumpsit &c.* and *non solvit* and issues.

Before the suit was brought, John Wistar and John M. Price, *bona fide*, and for a valuable consideration, assigned the account on which the suit was brought, to Charles Wistar. John Wistar was offered, and admitted as a competent witness to prove an acknowledgment of the testator, John Walker in his life time, in order to prevent the operations of the statute of limitations; the Court reserved the point, with liberty for the defendant to move for a *non suit*, which was now done.

At the trial, the witness said, that he was not directly or indirectly interested in the event of the suit, having parted with every particle of interest in the claim, which was prosecuted entirely at the risk of the assignee, the sole owner; though he admitted, that the transfer was made with an intention to open the way for his testimony.

It was argued by *M^cKean*, for the plaintiffs, and *S. Levy* for the defendant.

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S. Levy, for the defendant.

The admission of the witness in the present case was contrary to the principles of sound policy. There is no part of the jurisprudence of our country which will bear a stricter scrutiny from the eye of reason, than the law of evidence. To a superficial observer, the application of its rules may sometimes appear to oppose the justice of a particular case, but an examination of the general principles upon which the rule is founded will satisfy the learned enquirer that it rests upon the sure basis of justice. The rejection of interested witnesses does not prevent the elucidation of the truth. From the nature of human passions and actions, it is rather a ground to disbelieve, than to believe a fact, that the evidence of it depends on the testimony of a party interested; and therefore, it is no injury to society to remove, an incompetent witness from the hearing of the jury; those who may hurt themselves by sliding into perjury, but who can never lay the ground for a rational belief. Some men no doubt would be incapable of telling an untruth, though under the influence of the greatest interest, (and of this number might have been the witness received in this case), but others would betray the most solemn obligations for a trifling consideration, therefore nothing short of an universal exclusion of all persons interested, however latent or remote the interest, can preserve infirmity from snare, and integrity from suspicion.

He admitted that the cases of *M^cEwen* against *Gibbs*, and *Steele* against the Insurance Company, had proceeded great lengths in the admission of witnesses; further, he conceived, than was warranted by any judicial decision of England.

M^cKean for the plaintiff.

The general rule is, that to exclude a person from being a witness, he must be either infamous or interested (*a*). In this case the first is not pretended; let us examine the

(a) 3 Bin, Rep. 313. *Steele* against *Phoenix Ins. Comp.*

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last. John Wistar, though a nominal plaintiff, is, in fact, not a party to the suit. If he had given an order to discontinue the action, it would have been entirely disregarded (a). A payment to him would not have discharged the defendant (b). The defendant might have pleaded, that the action was to the use of Charles Wistar, and made a set off of a debt due from him (c). But it is said, that the witness was incompetent, for, being a party to the record, he is liable for the costs. It is at least doubtful whether he is liable for the costs (d). In *Canby against Ridgway*, before referred to, the Court granted a rule on the assignee to pay the costs, though his name had not been placed on the record.

The inclination of the court has, of late, been, to admit a witness, unless where the objection to his competency is clear (e) where the possibility of interest is remote, it goes only to his credit (f). A creditor is not excluded from giving testimony, as such (g). The proper enquiry of a witness on his *voyer dire*, is, whether he is to gain or lose by the event of the cause (h). In trespass, if one whom the plaintiff designed to make use of as a witness, he, by mistake, made a defendant, the Court will, on motion, give leave to omit him, and have his name struck out of the record, even after issue joined (i). A guardian, being released may be admitted as a witness, in favor of his ward (k). In *Mifflin et. al. against Bingham* (l), *M'Kean* C. J. lays down the rule to be, that if a witness speaks under an interest it is fatal to his competency; if he is liable to an influence, it taints his credibility. In *Peterson against Willing, et. al.* (m), the mortgagee, after his discharge by the insolvent law, was admitted as a witness, to prove the consideration on which the

(a) 1 Dall. Rep. 139. *M'Cullum against Cox*.

(b) 2 Dall. Rep. 265. *Zantzinger against Old*.

(c) 1 Bin. Rep. 496. *Canby against Ridgway*.

(d) 2 Dall. Rep. 172. *M'Clenahan against Scott*, in a note to Feild for the use of Oxley, et. al. versus Biddle.

(e) 2 Dall. Rep. 240, 241. *Commonweath against Ross*, 3 Dall. Rep. 508.

(f) *Bul. N. P.* New York, ed. of 1806, 290.

(g) 2 Dall. Rep. 50. *Innis against Miller*.

(h) *Bul. N. P.* 283. (i) *ibid* 285.

(k) 2 Dal. Rep. 196. *Pleasants, Administrator, against Pemberton, Administratrix*.

(l) 1 Dall. Rep. 272, 276.

(m) 3 Dall. Rep. 506. 8.

mortgage was given. The Court in that case said, "as to
 "the *interest* of the witness, it does not seem to be affected
 "by the *event* of this cause : and the laudable liberality of
 "Courts of justice, in modern times, has set us the example,
 "for referring all such objections of doubtful and distant in-
 "terest, to the credit, rather than the competency of the
 "party."

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The grantor of real estate has always been admitted as a witness, where he has parted with all his interest, and there is not a general warranty (a). But the cases which are decisive on this point are, Steele against Phoenix Insurance Company (b). It was an action on a policy of insurance ; the plaintiffs had assigned all their property to assignees for the benefit of their creditors, from whom they received a release ; the cause was marked to the use of the assignees, by whom all the costs were paid. Under these circumstances one of the plaintiffs was admitted as a witness. And M'Ewen against Gibbs (c). The plaintiff, who was a certificated bankrupt, was called as a witness to prove a parol acceptance of the bill of exchange on which the suit was brought ; and it appearing, that the assignees carried on the suit and had entered into security for costs, he was admitted.

PER CURIAM.

Hemphill, President.

In this case, John Wistar, one of the nominal plaintiffs, was offered and received as a witness, reserving the point as to his competency, with liberty to move for a *non suit*.

It appeared that the nominal plaintiffs had, before the action was brought, assigned a book account (which was the claim in the present suit), for a valuable consideration, to Charles Wistar.

The witness, upon his affirmation, answered, that he was not interested *directly* or *indirectly* in the event of the suit ; that the transfer was made with an intention to open the way

(a) Chief Justice and Yeates, Justice, Steele against Phoenix Ins. Comp.

(b) 3 Bin. Rep. 306.

(c) 4 Dall. Rep. 137.

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for his testimony, but that he had parted with every particle of interest in the claim; that Charles Wistar was the sole owner of it, and that he carried on the suit entirely at his own risk. There was not the slightest suspicion of its being a more colourable transfer; but it was acknowledged that the transaction was fair and *bona fide*. The objection to the competency of the witness was made upon *strict legal principles*.

The general rule is, that any person not infamous nor interested is a competent witness; and from the late decisions, the circumstance of the witness being a party to the suit forms no objection to his competency, if he is not really interested.—Let us enquire;

First, Was the witness interested?

Secondly, If not, is it against the principles of sound policy to receive his testimony.

It is very clear that he is not interested, unless he is liable for the costs, being the nominal plaintiff on record. He did not guaranty the debt, and from his answers, Charles Wistar was to incur the sole risk of its recovery.

In the case of *McCullum against Coxe (a)*, the Court would not permit the plaintiff, who had assigned the cause of action to another person, to *discontinue*; from which it is shewn, that the nominal plaintiff has no control over the suit. In this State the Courts take Judicial notice of the *equitable owner of a chose in action*, and consider who are the real parties to the suit. After the transfer and notice, the assignee stands in the place of the original creditor for every substantial purpose; payment must be made to him, and any set-off against him will be admitted. It is every days practice to bring the suit without consulting the assignor, and even without his knowledge; the controversy may often extend only to set-offs and payments made to the assignee after the transfer, in which the assignor had no concern.

In the case of *Steele against the Phoenix Insurance Company (b)*, *C. J. Tilghman* says, that in such a case, we consider the assignor as out of the question; and should issue an

(a) 1 Dall. Rep. 139.

(b) 3 Bin. Rep. 312.

attachment for costs against the person for whose account the suit is brought, in case of judgment for the defendant. In the case of Canby against Ridgway (*a*), the Court compelled the assignee to pay the costs ; considering him as the substantial party, although his name did not appear on the record.

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The Court are of opinion, that where a *chose in action* is assigned before suit brought, the nominal plaintiff is not liable for costs, where the transfer is without any collusion, and where the nominal plaintiff takes no part in carrying on the suit, nor is to gain any advantage from its termination, in any respect.

Secondly, Is it against the principles of sound policy to receive the testimony of such a witness ?

This point appears to be in substance decided in the case of Steele against the Phoenix Insurance Company (*b*) ; that part of the C. J.'s opinion which relates to this question, is as follows : “ Let us now consider the danger, which, it is said, “ will arise from admitting the testimony in the case before “ the court. It is supposed that bad men will transfer their “ rights of action to third persons, in order to open the way “ for their own testimony. This objection applies equally to “ assignments made before or after the commencement of “ the action, and it applies also to cases over which the Court “ has no control, such as sales of rights to land, and assignments of bonds under our Act of Assembly ; in both which “ cases the Vendors may undoubtedly be witnesses if they “ are divested of all interest. It will be remembered too, “ that, before the witness is admitted, he must satisfy the “ Court that he has been guilty of no collusion ; that he has “ divested himself of every particle of interest ; that he is “ neither to gain nor lose by the event of the suit ; and to “ these points he must answer upon oath. If he really is “ entirely disinterested, I see no great danger from the circumstance of his having been once interested. And, after “ all, the Jury will judge of his credibility.” “ Where a man “ assigns all his property for the benefit of all his creditors,

(*a*) 1 Bin. Rep. 496.

(*b*) 3 Bin. Rep. 312.

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“there is, in general, no reason to suspect collusion ; but
 “where he assigns a particular thing to an individual (espe-
 “cially pending the action), and then comes forward to make
 “out the case by his own testimony, he should be watched
 “narrowly. *In all such cases the Court will admit, or reject*
 “*the testimony according to their conviction of the assign-*
 “*ment being a bona fide transaction or not.*”

The expressions of the Chief Justice fully embrace the case now before us. The sentiments of Judge Yeates (*a*) coincide with those of the Chief Justice ; he says, “it is no
 “solid objection to assert, that by introducing the original
 “party as a witness, a door is thrown open to fraudulent
 “practices, wherein a secret interest might be secured to the
 “failing debtor. The same observation is applicable to a
 “vendor of lands, who conveys without covenants of war-
 “ranty ; or where there are such covenants, on the vendee
 “executing a release at the bar ; and yet in such cases it
 “is matter of daily practice to admit such witnesses to
 “be sworn.”

In the above case it is said that the assignor of a Bond under our Act of Assembly can undoubtedly be a witness. And in the case of Baring, assignee of Cutting *against* Shippen (*b*), Cutting, the assignor, was a witness.

As far as merely respects the policy of admitting such a witness, the assignor of a Bond, under our Act of Assembly stands precisely in the same situation as an assignor of a *chose in action*, and the same danger is to be apprehended from the admission of his testimony ; the same door is open to fraud ; a colourable assignment of a Bond, could be made with equal facility with a colourable assignment of a *chose in action*, and a secret understanding, may be suspected in the one case, as soon as the other.

With regard to the circumstance of the transfer being made in order to make the assignor a witness, it is every days practice to admit a witness who actually comes to the bar interested, his interest being removed with an express design to open the way for his testimony, the moment before it is

(*a*) page 316.

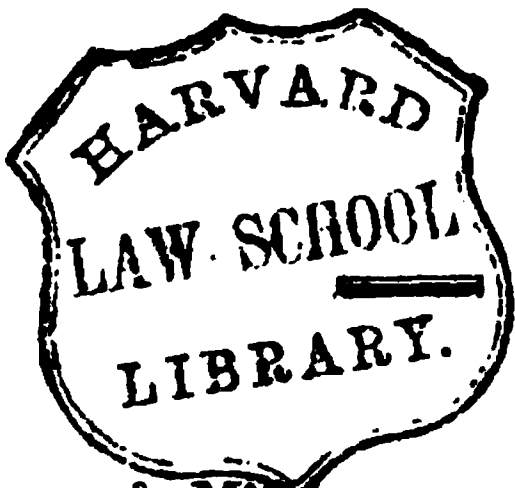
(*b*) 2 Bin. Rep. 154.

received ; and in such a case, there can seldom be but little expectation that his testimony will be changed by the release. If he is liable to be prejudiced, his mind has already received all the bias that the interest can produce, and under its influence his recollection has been made up ; and what he is to say, has perhaps been frequently repeated to the party producing him. After all, whether a witness has once been interested or not, a reliance upon his testimony must principally depend upon the goodness of his character ; it must however be admitted, that interest may, on some occasions, bias the most honest minds : It is safe to say so, as the wisdom of the law, which has been handed down for ages, supposes it ; and although the interest may be removed, the effects of it may not be entirely gone. The Jury must then always judge of the credibility of the witness, under the circumstances of the case in which he appears.

The Court, upon the whole, think that the witness was competent, and refuse a new trial.

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Rule discharged.

COATES & M'CARNEY against M'CAMM.

March 7.

A FOREIGN attachment, in case, had been previously issued by the plaintiff against the defendant, on the 28th of February one thousand eight hundred and eleven, in which no declaration was filed.

On the 19th of March, one thousand eight hundred and eleven, the Plaintiff's counsel told the prothonotary or his clerk, that the Foreign attachment was to be discontinued, and asked if he would consider him as liable for costs, and discontinue it ; this was assented to, and on the same day the

In general writs, where the special matter is not set forth, if the plaintiff is non-suited before he counts, and a second writ has been issued pending the first, yet the former cannot be pleaded in abatement.

If a plea in abatement is entered in time, it must be disposed of before any judgment can be signed for want of an affidavit of defence.

A plea in abatement cannot be entered after a general imparlance. After judgment for want of an affidavit of defence, in an action of assumpsit, where the debt is not ascertained, a writ of inquiry must be executed.

No declaration was filed in the foreign attachment, and it was indisputably discontinued before the plaintiff counted in the second action. The law appears to be, that in general writs, where the special matter is not set forth, if the plaintiff is *non-suited* before he counts, and a second writ has been sued pending the first, yet the former cannot be pleaded in abatement; because it does not appear to the court to be for the same thing; but it is otherwise where the writs are special. (a)

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No opinion, however, need be given, with regard to the application of the above principle, to the case before the Court, as the question now to be decided is only whether the plea in abatement was pleaded in time; if it was, it ought to have been disposed of in some way, before judgment under the affidavit rule could, regularly, be signed; if it was not pleaded in time it was liable to be treated as a nullity, and the plaintiff had a right to sign judgment for want of an affidavit of defence.

The rule which requires an affidavit of defence means, an affidavit of defence *upon the merits*; the affidavit supporting the plea in abatement is not sufficient. If the defendant pleads in abatement in time, the plea must be replied to and disposed of before any judgment can be signed under the new rule of Court, although no affidavit of defence has been filed; for it may be, that the defendant has no defence upon the merits, still he ought to be entitled to the advantage of his plea in abatement. This brings us to the single question: was the plea in abatement filed in time?

The conclusion of the plea and not the matter, it is said, makes the plea in abatement; in this case the plea concludes to the bill and declaration, and prays judgment, if the defendant is bound to answer them, and that the same may be quashed. It does not however conclude in bar; and the matter is properly pleadable in abatement, and could not in this instance have been used as a plea in bar, which goes to destroy the plaintiff's right of action, and to disable him from

(a) 1 Bac. Abr. 23, 5 Co. 61.

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over recovering. The object of the plea is to compel the plaintiff to pay the costs in the present action and to bring a new suit. Such pleas are always regarded with jealousy, and the general rule is, that a plea in abatement cannot be pleaded after a *general* imparlance, but after a *special* one. (a) We know of no practice changing the rule, nor do we see any good reason, why it should be changed. The doctrine of imparlance has been recognized in this state. (b)

If the Court had any discretion on the subject, there is no inducement to exercise it in favour of the plea of abatement, as the former action is not now pending, nor was it at the time of the plea pleaded. We are of opinion, that a special imparlance ought to have been entered on the record, in order to entitle the defendant to his plea in abatement at the second term. The plea in abatement being too late, the Court are of opinion that it was regular to sign judgment for want of an affidavit of defence. But, as no inquisition has been held to ascertain the damages, the execution must be set aside; and if the defendant has merits he can avail himself of his defence before the inquest.

The rule, so far as it relates to the Judgment, discharged, and the other part made absolute.

HEATLY against MUSSI.

March 14.

The Court refused to abate a writ that had been issued against a freeholder, there existing unsatisfied judgments, although the judgments had been entered more than five years before the writ was issued.

THE defendant in this action, being sued by a *capias*, a rule was obtained, to shew cause why the writ should not be abated upon proof that the defendant was a freeholder. It was opposed on the ground that several unsatisfied judgments remained on record against the defendant; but it appeared that these judgments had been entered above five years

(a) 1 Sellon's Prac. 270-1-2. Saunde's Rep. 2. 4 Bac. Abt. 29. 3 Blac. Com. 301. 6 Bac. Abt. 10.

(b) 2 Dallas 263, 184.

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before the *capias* was sued out; and the only question was, whether that circumstance restored the defendant to his privilege.(a)

The Court were of opinion that the act of the fourth of April one thousand seven hundred and ninety-eight had no bearing upon the subject; and that so far as merely respects the defendant, when the rights of third persons do not intervene, judgments stand as they did before the passing of that act, to be revived by a *scire facias*. The object of the act, they said, was to benefit strangers who became interested in the lands on which the judgments were liens. By the tenth section of the act of the twentieth of March, one thousand eight hundred and ten, it is provided, "that no judgment, whether obtained before a justice, or in any Court of Record within the Commonwealth, shall deprive any person of his or her right as a freeholder, longer, or for any greater time than such judgments shall remain unsatisfied, any law, usage or custom to the contrary notwithstanding." The inference, said the court, is plain, that until the judgments are satisfied, they deprive the person against whom they are entered of the rights of a freeholder.

The Rule was discharged.

Heatly, in propria persona.

Browne, for the defendant.

(a) The words of the second section of the act of Assembly of the fourth of April one thousand seven hundred and ninety-eight are these:

"No judgment hereafter entered in any Court of Record within this Commonwealth shall continue a lien on the real estate of the person against whom such judgment may be entered, during a longer term than five years from the first return day of the term of which such judgment may be so entered, unless the person who may obtain such judgment, or his legal representatives, or other persons interested, shall, within the said term of five years, sue out a writ of *scire facias*, to revive the same."

1812.

April 29.

KENNEDY against SAVAGE, et al.

The representatives of the master of an apprentice, whose indenture did not extend to executors or administrators, but to assigns, are not entitled to receive the wages earned by the apprentice after the master's death and before the expiration of the apprenticeship.

CASE stated for the opinion of the Court.

Sarah Kennedy and Adam Premier,
adm'rs. of John Kennedy, dec'd.

against

John Savage and Joseph Dugan.

In the District Court,
for the city and county
of Philadelphia, of De-
cember Term, 1811.
No. 442.

On the 17th of May 1806, Alexander Moore, a minor, with the consent of Jane Moore, his mother, by Indenture duly executed "put himself apprentice to John Kennedy, now deceased (the Plaintiffs are his administrators) to serve him and his assigns, from the date of the said Indenture for, and during, and to the full end and term of five years, then next ensuing, during all which term &c." and the master was to use the utmost of his endeavours to teach, or cause to be taught or instructed the said apprentice in the trade or mystery of a mariner, and procure and provide for him sufficient meat, drink &c. (prout the Indenture).

John Kennedy being in bad health, on and for some short time before the 17th of April 1810, agreed and contracted with Captain Samuel Casson, master of the brig *Susannah*, owned by the defendants, and intending a voyage from Philadelphia to Gottenburgh, Lubec and St. Petersburg, and home; that Alexander Moore, his said apprentice, should go the voyage with him as mate of said vessel, at the wages of twenty-five dollars per month, the said apprentice was provided by his master, the Plaintiff's intestate; with all the necessaries for the voyage, which was performed, and ended on the 4th of June 1811.

On the 18th of April 1810, the said John Kennedy instructed Captain Casson, "not to advance Alexander Moore any money during the voyage, excepting enough to purchase sea stores for the homeward bound passage," and furnished him with a copy of the Indenture of apprenticeship, (prout the letter of John Kennedy to Captain Casson of this date.)

It is agreed that there are in the hands of the defendants, two hundred and forty-six dollars six cents of wages, earned

by the said apprentice, after his said master's death and before the expiration of his apprenticeship.

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If the Court, under the circumstances of this case, should be of opinion, that John Kennedy's representatives are entitled to the apprentice's wages until the term of his apprenticeship expired, then judgment is to be entered for the plaintiffs, for the aforesaid sum of money. If not so, then judgment is to be entered for the defendant.

Ross, for the plaintiffs, *Bache*, for the defendants.

PER CURIAM.

Hemphill, President.

In the case stated, the representatives of the master claim the wages earned by the apprentice, after the death of the master : the wages earned before his death have been paid to the plaintiffs.

Upon examining the authorities, it appears, that when an apprentice continues under his apprenticeship, after the death of the master, with the consent of all parties, it is so far a continuation of the apprenticeship, as to enable the apprentice to gain a settlement ; but in England an apprentice cannot be assigned over by the executors or administrators, except in places where the right is founded upon custom. It has, also, been expressly decided in the case of *Baxter against Burfield*, (a) that an apprentice is not bound to serve the executors of the master: and, in the same case, it was held to be an immaterial circumstance, that the assets were liable on the master's covenant to maintain. In *Burr. settlement cases*, (b) the right of the apprentice to hire himself after the death of his master, was not even controverted.

At common law, even after the statute of the 5th of Elizabeth, no action of covenant lay against an apprentice, for any breach of his indenture. Our act of assembly, passed the eleventh day of April one thousand seven hundred and ninety nine, changed the law on this subject in two respects:

(a) 2 Stra. 1266.

(b) 320.

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First. In allowing actions to be maintained against apprentices, for any breach of their indenture by absenting themselves.

Secondly. In prescribing the manner in which apprentices may be assigned. By this act the master may assign his apprentice to any person of the same trade or calling, provided the indenture extends to assigns ; and provided that the apprentice, or his or her parent or parents, or his or her guardian or guardians shall give his or her consent to such assignment, before some justice of the peace, of the county where the master or mistress shall live. By the same Act it is declared, that executors or administrators shall and may have a right to assign over the remainder of the term, after the death of the master, to such suitable person, as shall be approved of by the Court of Quarter Sessions of the county where the master and mistress lived, provided the terms of the indenture extend to executors and administrators.

The Indenture in the case before the court, does not extend to executors and administrators ; and the court are of opinion, that the word “ assigns ” is not sufficient to give the executors and administrators a right to make an assignment under the act. The apprentice and his parents or guardians may have a personal confidence in the ability and integrity of the master, and may be induced to submit to his choice of an assignee. Besides, there can be no strong reason to object to his right to assign, as the assignment is not binding, under the Act, without consent : but they may be unwilling to give the same power to the executors or administrators, who must be unknown to them, or to the Court of Quarter Sessions, where the apprentice or his friends are to have no control over the choice that may be made. It ought therefore to appear on the face of the indenture, that such a power was actually intended to be given ; and for that purpose the Act expressly requires that the indenture shall extend to executors and administrators : consequently the letter cannot be departed from, as it strictly corresponds with the meaning of the Act ; and even if the indenture was drawn in conformity to the Act, the administrators would not be entitled

to the wages earned after the death of the master; they would only be authorised to make an assignment in the manner prescribed by the Act. It is true they might have procured a compensation for the remainder of the term, by an agreement with the intended assignee before their application to the Court; but they have no power whatever over the apprentice, except through the medium of the Court; and as they have not complied with the Act in this respect, or taken any steps with that view, during the period of the indenture they can have no legal pretensions to their present claim.

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It was urged, that as the apprentice remained under the contract, he thereby gave his consent to serve the remainder of the term for the administrators; this argument is by no means tenable under the circumstances of the case. In fact he could not have changed his situation, neither did he know of his master's death until his return; and it appears that he claimed this portion of his wages the first opportunity that was offered to him. The defendant, therefore, having notice of the claim of the apprentice, ought to pay the money to the person who is legally entitled to receive it.

Judgment must be entered for the defendants.

Judgment for the Defendants.

CASES
IN THE
Court of Common Pleas,
OF THE
FIRST JUDICIAL DISTRICT.

SMYTH against M^cMASTERS.

All wagers laid upon the event of an election, are illegal and void.

THERE was a special verdict in this case, which found, that a wager had been laid between the plaintiff and defendant on the event of an election for Governor of Pennsylvania ; and that it had been won by the plaintiff. It did not appear whether the bet had been made before or after the poll was closed, or whether the parties, or either of them, were voters ; the cause therefore depended on the broad question, whether any wager on the event of an election was legal.

Purdon, for the defendant, contended that the contract was void, and that the plaintiff could not recover : He was not disposed to deny the right to recover a bet made upon indifferent questions (*a*), though he could not help noticing

(*a*) Indifferent wagers, upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular acts of Parliament ; and the restraints imposed in particular cases, support the rule. Lord Mansfield in *Da Costa against Jones*, 2d Cowp. Rep. 734.

Wagers fairly won are recoverable, unless &c. Rush, in *Morgan against Richards*, Browne's Rep. 173.

The law appears to be settled, that some wagers form the proper ground of an action. Van Ness, justice, in *Bunn against Riker*, 4 John. N. Y. Rep. 434.

From the earliest times down to the case of *Da Costa against Jones*, there appears to have been no doubt on the subject, (that an action would lay for a wager.) Lord Kenyon C. J. *Good against Elliott*, 3, T. R. 704. See also, 11 Co. Rep. 87 b. 1 Lev. Rep. 33. Carth. 338. 1 Salk. Rep. 344.

a remark made by Van Ness j. in Bunn against Riker (a). 1812.

“That as often as the question had been raised, there is
 “scarcely a judge in England, from the time of the case of
 “Da Costa against Jones, down to the present day, who has
 “not expressed his regret that such was the law (b).
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 against
 M'MASTERS.

Wagers, such as the present, are against the principles of morality and sound policy ; first, because they destroy the purity of our elections, by giving colour to bribery. The free, equal and unbiassed exercise of the right of suffrage, cannot be too much the object of every well wisher of our government.

But secondly, it involves in it a judicial enquiry into the validity of the election for the present chief magistrate. Will the Court and jury sit here to enquire whether the governor is governor *de jure* or governor *de facto*? Suppose this Court and jury should decide that he was only governor *de facto*, might this not create discontent among the people?

In New York, the point has been decided ; in the case of Bunn against Riker (c), which was a wager laid upon the election of the governor of New York, Kent, Chief Justice, and Van Ness and Yates, justices, were of opinion, that the contract was void, being against the principles of sound policy. This principle is confirmed by the Court in the case of Lansing against Lansing (d).

Browne, contra, said that it had been admitted as a general principle, that a wager fairly won was recoverable ; the plaintiff was therefore entitled to judgment, unless the case before the Court had been shewn to fall within some of the exceptions to the rule. They might be classed under five heads.

1st Such as tend to a breach of the peace. As the case put by Lord Mansfield, in Da Costa against Jones, of a wager that J. S. would not beat such a one, or seduce such a woman.

(a) 4 Johnson's N. Y. Rep. 434.

(b) Whether it would not have been better policy to have treated all wagers originally as *gaming contracts*, and so have held them void, is now too late to discuss. Lord Mansfield in Da Costa against Jones, 2 Cowp. Rep. 735.

I certainly agree with Lord Mansfield, that wagers have gone to an extent that is much to be complained of. Lord Kenyon C. J. in Good against Elliott, 3 T. R. 704.

(c) 4 John. N. Y. Rep. 426.

(d) 8 ibld 454.

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Secondly, Such as are contrary to morality. Of this class was *Brown against Leeson* (a), which was a wager laid on the mode of playing an illegal game; when the cause came on for trial, Lord Loughborough directed it to be struck out of the paper, as being of a nature highly improper to be the foundation of an action; with a proviso, that it should be restored in case the Court, on argument, should be of a different opinion. The Court refused to restore it. Gould justice, in delivering his opinion, says, "the game of hazard
" stands condemned by the law of England; there are many
" statutes which make it illegal, and nothing can be more
" injurious to the *morals* of the nation, than a public discus-
" sion of this nature, before an audience, whose curiosity is
" whetted, to attend the trial of such questions.

Thirdly, Such as tend to introduce indecent evidence. As *Da Costa against Jones*, which was a wager upon the sex of the *Chevalier D'Eon* (b). Lord Mansfield, though he admitted, that *indecent* of evidence is no objection to its being received, where it is necessary to the decision of civil or criminal rights, gave it, as one ground of his opinion against that wager, that the trial of it necessarily tended to the introduction of *indecent* evidence.

Fourthly, Such as affect the feelings or interest of third persons.

As the last mentioned case of *Da Costa against Jones*. Lord Mansfield considers, and very properly too, that it would be monstrous, and a disgrace to judicature, to allow two indifferent people, by laying a wager, to try whether a third person had been a cheat or imposter; and to subpoena his intimate friends and confidential attendants to give evidence that will expose him.

Fifthly, Such as are against sound policy.

The case of *Atherford against Beard* (c), was a wager whether the Canterbury collection of the duties upon hops, for the year 1786, would amount to more than the Canterbury collection for the preceeding year; and the wager was declared to be illegal, because it tended to expose to all the

(a) 2 H. Black. Rep. 43.
(c) 2 Term. Rep. 610.

(b) 2 Cowp. Rep. 729.

world the amount of public revenue, and drew that into discussion in Court, which could be canvassed only in Parliament, which was against the sound policy of the kingdom. Of the same class, also were the cases of Allen against Hearne (*a*), and Bunn against Riker (*b*), which were wagers laid between voters, with respect to the event of elections; in the first case the wager was laid before the poll began, and in the last case, before the poll was closed.

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There is no case to be found in the books, of a wager made at any time, between two persons *who are not voters*, or between two voters *after the poll had closed*, (except Lansing against Lansing), which was adjudged to be void. On the contrary, the reasoning in all the cases, which form the different classes above referred to, and with which the Court had, for that reason, been troubled, tended to the establishment of a different doctrine.

To begin with the case of Allen against Hearne. The special verdict states the plaintiff and defendant to have been voters, and Lord Mansfield, in delivering his opinion says, "This is a wager in the form of it, by two voters, and the event is the success of the respective candidates. The success therefore of either candidate is material; *and the moment the wager is laid both parties are fettered.*" And Buller, Justice; "If you put the case of a wager between a voter and another person who is not one, it is a *palpable bribe*; it is a sum of money laid to procure a particular vote, and that case cannot be distinguished from the present; the bias is exactly the same; it is a pecuniary compensation."

In Bunn against Riker; It is stated that *both Graham and Riker (the bettors) were electors, qualified to vote for governor*; one had voted, and the other had not. Van Ness, in delivering his opinion says, *the parties here are electors*, Graham had not voted. He then goes into an argument to shew, that though Graham was at a distance from the place where he ought to have voted, that *he might have voted, if he had been so disposed.*

(a) 1 Term. Rep. 56.

(b) John. N. Y. Rep. 426.

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The decisions of the supreme Court of New-York have no binding effect upon this Court. The opinion of judge Van Ness is respectable, as the opinion of a gentleman learned in the law ; but, as such, is of no further authority than it has law and reason to support it, and may be combatted by other opinions, equally respectable. It is not necessary to go out of the case itself, to find such an opinion. *Spencer*, Justice, takes a comprehensive view of the whole case, he admits the principle laid down in the case of *Allen against Hearne* to be sound, but distinguishes the case of *Bunn against Riker* from that case. “ Riker (he says) had already voted ;” and as to *Graham*, he very properly observes “ the verdict of the jury has settled that point ; it was a matter of fact peculiarly within their cognizance, whether *Graham* could vote at the election ; by finding for the plaintiff below they have virtually passed on that fact, and decided that he could not.”

Our case is, if possible, stronger ; it is a special verdict, and no fact is to be presumed, which does not appear on the face of it ; it cannot therefore be presumed that either of the parties to the wager were voters, or that the bet was made before the poll was closed ; and without presuming one or other of those facts, the law is clearly with the plaintiff. That one of the parties, must have been a voter, and that the wager was laid before the poll was closed ;—that it is not incumbent on the Plaintiff to shew that they were not voters, or that the poll was closed ; but that the burthen of proof lays on the defendant, is apparent from principle, and is abundantly established by authority.

Upon principle—the plaintiff claims judgment, on the general rule, that wagers fairly won are recoverable ; the defendant, to be exonerated from the payment of the money, must bring the case within some exception to the rule.

Upon authority ;—a wager was laid on the event of a decision of the House of Lords on an appeal from the court of the chancery (a). “ If this wager had been made with one of the judges or Lords (says Lord Mansfield) it would have been a bribe. “ But (he adds) there is no fact of that sort in this case.”

(a) *Jones against Randall & another* 1 Cowp. 37.

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So in our case if the wager had been with a voter, and before the poll was closed, it would have been a bribe, but *there is no fact of that sort in this case.*

Also, the much contested case of *Good against Elliott (a)* where a wager was, that *A* had purchased a waggon of *B*; it was endeavoured to bring it within the exception contained in the fourth class above stated, viz. "such as affect the feelings or interests of third persons." But Grose, justice, after admitting that wagers, that injure third persons, are void, says, "now it does not appear, that such a bet is an injury to any but the loser. It may be said, that it *may* involve a question, whether *L. Tye* stole it; but it does not necessarily involve that question; and therefore, after verdict, *we are to presume that it did not.* So, in the case before the Court, it may be said, that the bet *may* involve a question of bribery; but that does not necessarily follow, and the court, after verdict, will presume that it did not. It is, in this case, remarked by Ashurst, justice, that Lord Mansfield, in the case of *Da Costa against Jones*, directed the defendants counsel, in addition to his motion, in arrest of judgment, to move for a new trial, intimating, that in that way, he might have the chance of the advantage of the wager affecting the interest of the Chevalier, as well as the objections of the indecency of the evidence, which appeared upon the face of the record; which shews, that Lord Mansfield was of opinion, that a wager was not illegal, because, by some possible supposition which ingenuity might devise, it *might* affect the interest of a third person; but, in order to make it illegal, it must appear, that such circumstances *did actually exist*, which must necessarily or naturally tend to affect the interest of a third person.

Lord Kenyon, in the same case, (*Good against Elliott*) asks: What is there in the present case that can affect the character of the woman who had bought the waggon? *Nothing of that sort appears upon the record, and we can make no inference.*

The last case which I shall notice is *Lansing against Lansing (b)*. This was a bet laid, after the poll was closed,

(a) 3 Term Rep. 693.

(b) 8 N. Y. J. R. 454.

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and, if not liable to the following objections, is an express authority in the defendant's favour. But first, it was a case of *certiorari*, the sum in controversy was very small, and the cause does not appear to have been argued by counsel, nor were any deliberate opinions given by the Court. Secondly, it is stated to have been decided, on the authority of *Bunn against Riker*, "that a bet, involving an inquiry into the validity of the election of governor, was void on principles of policy." That was not the case of *Bunn against Riker*; but it was, as I have before shewn, a wager laid *between two voters, before the poll was closed*.

It is true Van Ness justice, puts it *also* on the ground of being against public policy, involving an inquiry into the validity of the election, but no case can be produced to justify such reasoning, and it is in direct opposition to the principles decided in *Jones against Randall*.

PER CURIAM.

Rush, President.

This is a wager on the election of a chief magistrate; and if ever a wager deserved reprobation, it is one of this description. In the State of New-York, it has been decided, after argument, that a wager of this kind, whether laid *before* or *after* an election, cannot be recovered; without adopting all the reasoning of the Court, in those cases, we have no hesitation in saying, we concur in *both* decisions.

Even in England they have guarded their elections from this new species of corruption, and have vacated all such contracts, as are contrary to sound policy.

Popular suffrage, is the very essence of Freedom, and cannot be protected by tribunals of justice, with too much vigilance and firmness. Those external impressions that have a tendency to disturb its orderly and regular motions, should be discountenanced, as repugnant to the vital interest of our Country. To the usual motives that actuate voters, it would be monstrous to permit pecuniary considerations to be mingled.

The success of an election might eventually become a matter of speculation and profit, like a horse-race, rather than an acquisition to the freedom and happiness of the people. Where a man has actually voted, *prior* to his laying a wager on the election, he is not indifferent to the result. Though he himself cannot become a corrupt voter, he may be induced, under the influence of the wager, to corrupt others.

What were the motives of Smyth and M'Masters, form no part of the question. Is the contract injurious to the public welfare? In our opinion, it is equally repugnant to morality, to sound policy and to the laws of the state, passed for the avowed purpose of preserving the purity of our public elections.

It would be in vain to enact laws against bribery, and to authorize at the same time, wagers, of this kind, which, like a torrent of corruption, would carry all before them.

Even if the bet had been laid between persons who were not voters, which does not appear to be the case, yet, as it might lead to a decision, by the judicial branch, on the validity of an election, and consequently to the right of a member to a seat in the legislature, the point ought never to be brought into discussion. It is obvious, that the legislative and judicial authorities might be put into a state of collision, upon a question, which it is apprehended, the legislature alone is competent to determine. Upon a case stated for the opinion of the Court they might give judgment, *prior* to the house of assembly deciding it, who might perhaps, afterwards, give a contrary decision. The most effectual way to avoid this, is *judicially* to pronounce, as they have done in New-York, all wagers upon the result of elections, to be illegal and void.

The constitution of our state declares, that elections shall be free. The body of the voter shall be equally free from constraint, and his mind from insuperable bias. A wager, that a certain person will be elected, puts the mind as completely into trammels, as a state of duress puts the body of the voter. The mind cannot act freely, as long as the man is held in bondage to his mercenary views and engagements; and, having divested himself of his *own* independence, he is

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It is the opinion of the Court, that the plaintiff cannot recover, and that Judgment be entered for the defendant.

Judgment for the defendant.

SMITH against WILDS.

An alderman has no power to issue a *scire facias* on a recognizance to appeal, after judgment obtained on the appeal, in the Court of Common Pleas.

A JUDGMENT was obtained before Mr. Alderman Shoemaker, against Philip White, at the suit of the present plaintiff; from which the defendant appealed, and gave the defendant Wilds, as his bail. After judgment obtained on the appeal, the plaintiff proceeded against the bail on the appeal, by a *scire facias*, issued by the alderman. Judgment was rendered in his favour, and the defendant having removed the proceedings to this Court, by a *certiorari*, the following exception was filed.

“The alderman had no power to issue the *scire facias*.”
Atherton, for the defendant, in support of the exception, said, that the fourth section of the one hundred dollar act directs the magistrate, in case of an appeal, to transmit to the prothonotary the whole proceedings had before him, and declares, that [from] thence the suit shall take grade with, and be subject to the same rules, as other actions where the parties are considered to be in Court; from which, he said, it was evident, that all proceedings, subsequent to appeal, whether against the defendant or his bail must take place in this Court. That the only plausible objection to issuing the *scire facias* from the Common Pleas, was, that they have not possession of the *original recognizance*, but that objection would be sufficiently answered by observing, that when the act required the *whole proceedings*

to be *certified* to the prothonotary it evidently must have intended, that the originals should be transmitted, or to have made the copies evidence.

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Armstrong, for the plaintiff, insisted, that the *scire facias* was properly taken before the magistrate, and that the judgment was regular; the original recognizance remains before the magistrate, who transmits a copy thereof to this Court. The copy would not be received as evidence, on the plea of *nul tiel record*, nor is there any method pointed out in the act by which the justice can be constrained to produce the original. He also added, that he had the authority of uniform practice on his side; not a single instance could be mentioned of a *scire facias*, such as the present, having been issued out of this Court.

But the Court, *RUSH*, president, were of opinion, that the exception was fatal, and that the judgment of the alderman must be reversed for want of jurisdiction.

Judgment reversed.

MARTIN against RICE.

THE plaintiff had transferred to the defendant the time of an apprentice boy, who had been bound to the plaintiff in the state of Connecticut, for which the defendant gave him a promissory note, for one hundred dollars. The transfer was by a parol agreement, made at Burlington, New-Jersey. The Boy served out about one half of his unexpired time with the defendant and then absconded.

Though a contract is invalid yet if it not contrary to law or fraudulent it will be a good consideration.

The defendant had paid fifty dollars on account of the note, and this action was brought to recover the balance. The cause had been tried once before and a verdict had been

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given for the defendant, which was set aside by the court, and a new trial ordered.

Allibone, for the defendant, contended, that the contract between the parties was contrary to law, and therefore the consideration could not be recovered. Apprentices, he said, were not assignable at common law.^(a) It was true, that, by the custom of London, and by particular statutes in some States in the Union, apprentices were assignable; but there was no such act to be found among the statute laws of New-Jersey. And by the custom of London, and by all the statutes on the subject, the assignment was required to be in writing.

That the assignment by parole not being warranted by law, the plaintiff could not support this action for the consideration of such a contract.

He cited and relied upon the case of *Mitchell against Smith* ^(b) in which it was decided, that a bond given to secure the payment of the consideration of a contract contrary to a particular statute was not recoverable.

C. J. Ingersoll, contra, contended, that the contract though not valid as an assignment of the indenture, was good as an agreement, and binding on the parties. Being therefore effectual, for some purposes, the consideration was recoverable.^(c)

The Court, *RUSH*, president, in charging the jury, confirmed the doctrine contended for by the plaintiff's counsel. The contract, they said, was good between the masters, but not binding on the boy. It would not authorise the second master to chastise the boy, if he proved refractory, or to bind him over to the Quarter Sessions, to have him punished for any misconduct, of which he might be guilty. But as long as the boy chose to stay it would answer all the purposes of a legal assignment; and if he absconded, the second master had his remedy against the other on his covenant or engage-

(a) 4 Bacon's Abridgment 577, title Master and Servant.

(b) 1 Bin. Rep. 110.

(c) 1 Salk. 68. Burn's Justice, title Apprentice, sec. 10. 1 Strange 1115. 1147. Burrow's Settlement Cases, 247.

ment. No consideration of that kind could affect the present action.

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The contract, though invalid, was not contrary to law, nor was it fraudulent; it was therefore binding on the present parties.

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Verdict for the plaintiff.

JUDITH VALENTINE, a feme sole trader against FORD.

CASE stated for the opinion of the Court.

On the eighteenth day of June one thousand eight hundred and six, the plaintiff was lawfully married to Peter Valentine, a mariner. On the 28th of March one thousand eight hundred and nine, Peter Valentine sailed on a voyage to some part of Europe, leaving his wife, the above plaintiff, without any support but her own labour, and has never since returned to the State of Pennsylvania, though he is supposed to be still living. The plaintiff has followed the business of making cigars for a living ever since her husband left Philadelphia. This has been and still is her only mean of supporting herself.

A feme covert whose husband, a mariner, had been absent more than two years, leaving her no support, but her labor may be considered as a *feme sole* trader, and may receive a distributive part of her ancestor's estate

Since the plaintiff's husband went to sea, fifty-five dollars and eighty-seven cents, money arising from the sale of some real estate of her grandfather Howland Ellis came into the hands of the defendant, as administrator of said Ellis's estate, which he is willing to pay to the plaintiff provided she can give him a legal discharge therefor, so far as to prevent her husband, if he should ever return, from compelling him, the defendant, to pay the money over again.

The questions submitted to the Court are, whether the plaintiff is a *feme sole* trader under the act of February

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one thousand seven hundred and eighteen, and if so, whether she can sustain an action in that character for the debt due by the defendant.

If the opinion of the Court be in favour of the plaintiff, then judgment is to be entered in favour of the plaintiff for the above sum with costs ; otherwise judgment is to be entered for the defendant.

PER CURIAM.

Rush, President.

It is extremely clear, that the plaintiff is a *feme sole* trader, under the act of February one thousand seven hundred and eighteen. The law should receive a liberal construction in favour of women, who are placed in that unfortunate situation, by the desertion of their husbands. Besides, the right of the plaintiff to a distributive share of her grandfather's estate, not being derived in any respect from her husband, she ought not to lose it by his absence. Indeed, if every channel of this kind, through which property might come into her hands were to be stopped, the benefit designed to be given to her by law, would be, in a great measure defeated. It would be somewhat inconsistent to allow her to trade, and at the same time to prohibit her from the use of money, which she would be legally entitled to, if she had *never* married or if her husband were *actually* dead. We are of opinion that judgment must be entered for the plaintiff.

Judgment for the Plaintiff.

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THE CASE OF JOHN TOWERS.

A Habeas Corpus issued out of this Court, to the jailer of the county, to bring up the body of John Towers. The jailer returned that he stood committed by virtue of two executions one at the suit of Tristram Gardina, out of the district court of the city and county of Philadelphia, for \$467 36, the other at the suit of Ann Vevil and Lewis Nicholas for \$78 92, issued from the office of Mr. Alderman Keppele. Towers, while in custody under these executions, applied, by petition, to the commissioners of the insolvent law of the 13th day of March 1812, praying to be admitted to the benefit of the law. He assigned to the curators in trust, for his creditors, all his estate, real, personal and mixed, who, having taken possession thereof, the commissioners granted him, agreeably to the terms of the law, a provisional discharge.

The defendant in an execution issued by the District Court for the city and county of Philadelphia, petitioned for the benefit of the Act of Assembly of the 13th of March 1812 and having obtained a provisional discharge he was liberated from prison by this court upon a habeas corpus.

Under these circumstances, Towers, still being held in confinement, applied to this court to be set at liberty.

It was argued by *Randall, J. R. Ingersol* and *S. Levy*, for the petitioner, and *Chauncey* and *Wallace contra*.

PER CURIAM.

Rush, President.

The question turns altogether upon the meaning and construction of the law. Whatever is the intention of the legislature must be carried into effect. This law is so entirely different in its provisions and language from every other bankrupt law, that, we shall derive no light from them. In its most material parts it resembles no other insolvent or bankrupt law. The act speaks for itself. By the words and meaning of it, the right of Towers the petitioner, must stand or fall.

Where a person is brought before the court on a Habeas Corpus, he must be either bailed, remanded or discharged. In the judgment of this court, it is of no importance, whether

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the tribunal from which the execution issues, is of the highest or lowest grade. If the law requires the party to be sent back, it is the duty of the court to remand him. If the law requires him to be liberated, it is the duty of the court to discharge him. Under the law of the 11th of April 1790, a debtor arrested in execution, in vacation on giving bond and security to comply with the law, was instantly discharged from jail by the order of a single judge, and that without any notice to the plaintiff in the execution. What has been done by the legislature may be again done.

Under the English bankrupt law, the first step which is always taken by the *creditors* is, to ascertain whether an act of bankruptcy has been committed. Under our law the debtor himself takes the first step, and immediately after presenting a petition, surrenders to the law his whole property, it passes immediately into the custody of curators, who take possession as trustees for the use of the creditors.

The persons entitled to the benefit of this law are described in the first section, to be citizens who have resided two years in the commonwealth. The words are so comprehensive, that they include every citizen; whether he be in jail or at large, whether confined on mesne or judicial process he is equally entitled to all the privileges and benefits of the law. In this stage of the business the commissioners have an unquestionable right to enquire, whether the petitioner be a citizen or not; if he be not a citizen, the petition should be rejected. We take it for granted then, that John Towers is a citizen.

The term *provisional discharge*, does not appear to be used with strict propriety. There is no condition mentioned on which the discharge depends for its operation. The discharge, whatever may be its effects, is absolute as long as it exists. It appears to be rather temporary than conditional. Its effect, as stated in the act, is to protect the petitioner from all arrests in civil cases either on mesne or final process, until his case shall be finally heard and determined.

Though the arrest and imprisonment are sometimes different things yet the legislature have used the words to designate any restraint of the person, whether in or out of jail

by means of any civil process. The words of the act are, "he shall be protected from mesne, and final process in all civil cases." The restriction of privilege to civil cases shews that in such cases he was to be as effectually protected as in criminal cases he would be exposed both to arrest and imprisonment.

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Does the discharge of John Towers by the curators, extend *backward* as well as forward? Do discharges include persons who present petitions while in actual custody, as well as those who were never deprived of their liberty? To both these questions we answer in the affirmative, for the following reasons.

Whenever a citizen receives a provisional or temporary discharge, (and no other person can receive it,) the curators are authorised to allow him the use of his house and furniture, but how can this be, if the petitioner be in jail. The law therefore supposes him to be at large; otherwise this part of it would be a nullity. There is no exception in the law, every person who has obtained a provisional discharge is supposed to be an object of this part of the Law, which it is plain he can never enjoy, unless he be liberated from the custody of the jailer. He can never be in two distinct places at one and the same time. It is altogether absurd to suppose that the law authorised the jailer to keep him in prison, and that it authorised, at the same time, curators to allow him the occupation of his house, and the use of his furniture.

When the assignees are appointed they are directed to receive from the curators all the property of the petitioner, except such articles of furniture as may be necessary to him, in the opinion of the commissioners, and also the tools and implements of his trade, and his militia arms, and accoutrements.

Upon any other supposition, than that the petitioner is at large, this clause is completely absurd and unintelligible.

Two descriptions of persons are vested with a right to petition, those who are in custody, and they who are so fortunate as to be at large; and it is highly probable, that those of the former description will be much the most numerous. It is indispensably necessary, that they and the commissioners

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should be brought into contact, they must be gotten together in some way ; either the commissioners must wait upon the petitioner in jail, or the petitioner must go to the commissioners' chamber : which, I ask, is the most consistent with reason and propriety ? In England their bankrupt law orders the commissioners to attend on the bankrupt in jail ; in our law there is no such provision. It is optional with the commissioners to appoint such *time* and *place* to hear the petitioner, as they please ; consequently they are under no *legal* obligation to hold their sitting in the jail ; as they have no power to issue a Habeas Corpus, and are not obliged to go to jail, and at the same time, the man has an *undoubted right to be heard*, it would seem a necessary construction of the law, in order to carry it into effect, that he should be free from restraint, and controul of every kind.

There appears to be something very harsh in the construction of this law, to require him to surrender every particle of his property in the first instance, and to keep him in jail, three months afterwards. It would seem much more rational to say, that he ought to enjoy his personal liberty as a recompense, and in consideration of his relinquishing every thing to his creditors.

Two discharges are mentioned in this law, the first temporary or provisional, the latter, final, under the hands and seals of the commissioners, which shall be a sufficient authority to any sheriff or jailer, to set such petitioner at large if imprisoned. The sixth section corroborates the construction, that the petitioner is supposed to be at large. The law being limited to the city and county of Philadelphia, and the petitioner at large, might possibly wander into some other county, and be there detained in prison, at the time of allowing his final discharge or certificate. The very terms, any sheriff or jailer, so indefinite in there application, appear to be used in opposition to the sheriff or jailer of the county of Philadelphia.

By the English bankrupt law, if the bankrupt is likely to run away between the time of issuing the commission and the last day of the surrender, he may be arrested and sent to jail, that he may be forthcoming before the commissioners,

who, in this case, as well as any judge or justice, are empowered to grant the warrant. There being no clause of this kind in our law, this court is neither authorized to insert it, nor to detain the petitioner in jail for want of it. Upon the whole, under every view we have been able to give this law, we are clearly of opinion, that it was the intention of the legislature, that the petitioner after assigning his estate to the curators, should not be detained in jail. It is the judgment of the Court that he be discharged.

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Prisoner discharged.

NOTE.—Something was said on the argument of the unconstitutionality of this Insolvent law, but as the point was not seriously urged the Court gave no opinion thereon.*

[* No Act of the Legislature has ever been judicially determined by the Judges of Pennsylvania to be unconstitutional. The point has frequently been agitated in Court and discussed before the public; the following from the pen of Mr. Justice Breckenridge, contains the most comprehensive and rational view of the subject I have ever seen.]
[REPORTER.]

ON THE RIGHT OF THE JUDICIARY POWER TO JUDGE OF THE CONSTITUTIONALITY OF A LAW.

IT has been made a question, whether the Judicial branch of the government, has authority to compare legislative acts with the constitution, and, in any instance, be able to pronounce an act to be contrary to the constitution and therefore void? I do not rest upon the argument, that it is in the oath of office of a Judge, "to support the constitution." For, all officers, executive and judicial, are bound, "by oath or affirmation, to support the constitution."

It does not follow that the clerk of a court, who takes the oath, has authority to determine on the constitutionality and obligation of an act of the legislature. It cannot, therefore, be on the ground of having taken an oath, that this right accrues, or obligation is possessed: It must be shewn to be the duty of the office. By article 3, of the Constitution, the oath or affirmation is prescribed to all officers, "to support the constitution, and perform the duties of their respective offices with fidelity."

All admit, that the constitution is the law paramount; but who are the legitimate expositors of its extent? the people doubtless, the framers of the compact. But, through what organ is their exposition to be made known? Who is to give the explanation, or affix the comment? the members of the legislative branch are sworn "to support the constitution." This involves the enacting laws within its circumscription and authority. At the expiration of the period for which they were chosen, it is in the power of the people to express their sense against a law, by choosing others and procuring a repeal. But in the mean time, are they at the mercy of an unconstitutional law? Are the judiciary bound to carry into effect a law against the prohibitions of the Constitution: does the safety of the community require that the judiciary branch shall exercise a co-ordinate authority with the legislative, to judge of the constitutionality of a law? That the legislative branch may trespass upon the constitution is admitted. In the case of a general law, it is more likely to be felt, than in that of a law affecting a portion of the community. But, even in the case of a general law, the injury is not always felt at once. On the contrary, immediate convenience may render it agreeable, though hurtful in the ultimate operation.

But admit the power of the judiciary to arrest the execution of a Law; and you admit the power in all cases. The answer is, that there is no temptation to exercise the power wastonly; no motive; no object. It is, on the contrary, an ungrateful task. The danger is the finching from duty, awed by the law-making power for the time being, and the popular opinion of the day. The undertaking is arduous, and requires fortitude.

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It is not reasonable to suppose, that men will encounter it from the mere abstract pride of exercising power without some advantage. At least, on the common principle of self-love, the presumption is against it.

It may be argued that without this power in the judiciary, the use of exceptions and restrictions in the constitution will be much lessened. The constitution will vary with the flux and re-flux of representation, in the legislative body; whereas, by the judicial negative, not in the making, but in the execution of a law, there is a double security. It would seem, therefore, that the judiciary is not a mere subordinate functionary in the administration of the laws, but a branch of the government itself, co-ordinate with the law-making power, and bound to regard the constitution, and compare the law of the legislature, with the superior law of the people.

But, can it be the duty of the judiciary to resist the will of the law-making power, when two thirds of that power can remove from the judicial office? or to assist the will of the law-making power for the time being, in carrying into effect a law against the provisions of the constitution, when, on a change of administration, two thirds can remove for so assisting? This is a dilemma, and proves, at least, that it must be in the case of a law, against the express provisions of the Constitution, that the judiciary are bound to interpose.

But, suppose a law against an express provision of the constitution, are the judiciary bound to execute? When the people come forward in election, and displace a delegation, will it justify the judiciary to say, we obeyed the law-making power for the time being?—or rather, will not the people, by the new delegation, say, you were appointed learned in the law, furnished with a written instrument, the *magna charta*, the great paper of our liberties, and yet with this document before you, you have carried a law into effect against the express provisions of it. You have betrayed your trust; you have not supported the constitution. It would seem to follow that the courts have a right to deliberate and judge upon a law.

But, can, the new delegation call themselves the people, any more than the former? Can it be a misdemeanor to execute a law of the law-making power? Is not obedience to the will of the representation *de facto* excused? Will not resistance to the will of the representation *de facto* be punished? How can the people but by representation, come forward, and make their will known; sit in judgment on the judiciary and say, you have abused your trust, or fulfilled your duty? It would seem therefore, that a legislative exposition, by a law, must be taken for the time being, to be an exposition of the people.

But, in the very nature of the establishment of the courts of justice, the people have entrusted the right of exposition, in the last resort, with these courts, and vested the judiciary, with the right paramount, to judge of the construction of the constitution. Why, then at the same time, subject the judiciary to the law-making power, by impeachment; or by removal, for causes which may not furnish ground of impeachment? Contrariety of exposition will be said to furnish cause of removal, or of impeachment itself; and determine the tenure of good behaviour.

But this supposes a perversion of the power of removal or impeachment. But what remedy? Appeal to the people. But a convention in the case of a questionable law, is not contemplated by the compact. Nor would it be convenient. It must rest with the constituted and subordinate authorities; exclusively with the law-making power consisting of the two houses, the annual, and quadrennial, with the qualified negative of of a triennial executive; or, concurrently with the judicial power, of unlimited, but conditional permanency, in an absolute negative in the execution. It is a point of constitutional law, which rises in magnitude in proportion as I contemplate it.

Whether the law-making power, emanating more immediately from the people, and, at stated periods revocable by them, shall legislate uncontrollably, under its own construction of the constitution; or, whether the more remote but more permanent power of the judiciary, shall exercise a judgment, either in cases, where the law-making power shall invade the constitution with sinister intentions, if we can suppose that possible; or, what is more likely to happen, when it may arise from an uninformed spirit of reform. It would seem, that in such cases, the judicial negative might be a desideratum, an auxiliary check, a collateral guard of equal rights against unequal laws. It was, in fact, the understanding at the formation of the constitution; or, by some means has come to be the understanding since, that the judiciary possess this power. It has been thought to be a great point gained in the science of government. The judiciary has been thought to be more with us, than under the British constitution, a mere expounder and administrator of the law, in matters of *monum* and *num*, or of the criminal code. Its highest function was thought to be the testing laws by the constitution. The theory is good; but can it be reduced to practice? Existence at the will of the law-making power even in a qualified manner, and at the same time, a controul over it, is what I cannot well reconcile more especially, as the power of the legislature over the judiciary, is expressly

given, and that of the courts over the will of the legislature, can be but by construction and the exposition of the courts themselves. Can it exist but by courtesy? Can it be a duty, which carries with it official suicide? We may try a principle by enquiring, can it be carried into effect?

The structure of our state constitution is similar to that of the United States. Yet there are arguments, in support of a similar power under the constitution of the United States, which do not exist under the state constitution.

By the constitution of the United States, the judicial power is limited to cases arising under "the constitution, and the laws." In the debates in the conventions of the several states, on the adoption of the constitution, was not the power, of the judiciary, to test the laws by the constitution, considered as a principle of the system? Through the medium of the press, it was certainly the comment.

It was considered as a principle giving security, conferring stability; as, in itself, a *bill of rights*. Has not the legislature of the Union recognized "the principle, in the law constituting the courts, and which prescribes the judicial oath, "that they perform the duties of their office, agreeably to the constitution and the laws." The courts of the United States have acted under this idea, and declared *laws void*. No protest on the part of the legislature of the Union: no dissent on the part of the states, by moving for an explanation by amendment to the constitution. It would seem, therefore, to be an authority expressly given or conceded.

Under the state constitution, there is nothing said of the extent of the judicial power, but in these words, "The several courts, besides the powers heretofore usually exercised by them, shall have" &c. Was this a power usually exercised before the constitution; or is the power drawn by construction from the compact, under the idea, that the constitution is the first law, and that it is the province of the judge, to expound, and to execute the laws.

"Powers usually exercised," are terms which may not include the power in question; but, it may be argued that it was not thought of; or, that a power of so high a nature would have been specially designated. Yet, to say that the constitution is directory to the law-makers only; and that courts and juries have no interposition against subordinate law, in favour of constitutional right, is an imperfection, which nothing but the impracticability of a contrary principle, can reconcile with a wise ordination.

The protection of the judiciary, should it exercise the discretion, and risk this peril of setting itself in opposition to a particular law, must be in the *understanding of the people*.

Hence, it would seem that it must be no ordinary case, that will justify an interposition. It must be such a case, as, upon a fair investigation, will carry with it the sense of the great body of the community. It must be a case of such gross outrage upon the letter of the constitution, as, in moral probability, will reach the understanding of the mass, and induce the sovereign, the people themselves, to instruct their representatives in the legislature. The authority of opinion must govern; and on an appeal to a court and jury, by a party, from a constitutional violation, in a plain and simple case, I might deem it practicable to support the privilege.

In the case of a law of the United States, it will be found, that a power in the state courts, and in the courts of the United States, to resist the execution of a law on the ground of unconstitutionality, is necessary to individual, or state right. And the same power in the state courts, with regard to our state constitution, though it may be the spirit of the time to frown upon it, and to run it down, may come to be understood and acknowledged as an essential principle of freedom. This will depend somewhat upon the wisdom of the application. The exercise of this power, in a case of abstract deduction, and not immediately comprehensible by the common mind, may excite a prejudice, and set the public mind against it. That may be lost in practice, which exists in contemplation.

In the case of a law of general policy, there will be less reason for the application of this power; because, being felt by the whole community, and the operation found obnoxious, the majority can procure a repeal. But even in the case of a majority approving and persisting to support, the minority has still its rights, under the constitution; and an appeal may be contemplated. But it is in the case of a special law chiefly, that an appeal will be found necessary, or practicable; because a special law, affecting an individual, or corporate body, a particular district, or portion of the community, may more easily be pushed upon the legislature, by a party interested; and a repeal less easily procured. It would seem reasonable, therefore, that in the case of a special law, an appeal to the courts of justice should exist, where the party aggrieved can be heard by themselves, or by counsel; and maintain a private right.

Under the constitution of the Union, the individual states will look to the judiciary of the Union, to be heard and protected from powers *not given*. They will look to their state judiciaries in the first instance, where the jurisdiction is concurrent. No state, or citizen of a state, will say that they have not the barrier of a judiciary between them

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and the encroachments of the Union. The judiciary of the Union must have these powers, or they cannot afford the protection.

Under the constitution of the state, there must be the same rights to the parties to the compact. For, in the one case specified powers are given, in the other rights are reserved. But an individual of the state commonwealth, has not the same power to assert his right; for the body politic of a state has more strength with regard to the Union, than a citizen with regard to a state. The legislature of the Union will not dare to question the right of a state, or of the citizens of a state, to an appeal from a law to tribunals of law: but the law-making power of a state can bear down this privilege, and it may be, that a law of the administration, for the time-being, cannot be resisted. But speaking of the constitutional power abstractedly, there can be no doubt.

Taking it for granted, then, that a power of this nature in the courts of justice springs from the constitution, and is necessary for its preservation, it is evident that it must be a clear case that will justify the use of it; a transgression of an express provision of the constitution; an infraction obvious to every one, like the light of the sun, it must strike every observer. The judge who shall undertake to pronounce a law unconstitutional, must himself be well persuaded of it; he must have no doubt; he must have such reasons before him as will carry with them unanswerable evidence, and will force general conviction; he must consider, that what he undertakes, is to set aside an act of the legislature, and that for this, he, in fact puts himself upon the country.

—NOTES.—

The English lawyers admit that an act of parliament against law and reason is therefore void, [4th Rep. 18.] That, in many cases, the common law will controul acts of Parliament; and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void. Some statutes are made against law and right, which those who made them perceiving, would not put them in execution, [8. Rep. 118]. That an act of Parliament made against natural equity, as to make a man a judge in his own cause, is void in itself; for *jura naturae sunt immutabilia*, and they are *leges legum*, [Hob. 87]. And "it is a very reasonable and true saying, that if an act of Parliament should ordain, that the same person should be a party and a Judge, or, which is the same thing, judge in his own cause, it would be a void act of Parliament; for it is impossible that one should be judge and party; for the judge is to determine between party and party or between the government and the party; and an act of parliament can do no wrong; though it may do several things, that look pretty odd" [12 Mod. 687, 688]. And "If there arise out of acts of parliament, collaterally any absurd consequences, manifestly contradictory to common reason; they are, with regard to those collateral consequences, void." I lay down the rule with these restrictions, although I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done, which is unreasonable, I know of no power that can controul it; and the examples, usually alledged in support of this sense of the rule, do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it: for that were to set the judicial power above that of the legislature, which would be subversive of all government." "No court has power to defeat the intent of the legislature, when couched in such evident and express words, as to leave no doubt concerning its intention" [1. Bl. Com. 91.] And "we cannot expect that all acts of legislatures will be ethically perfect; but if their proceedings are to be decided upon by their subjects, government and subordination cease." [El. Jur. 49.]

"An act of Parliament, in England, can never be unconstitutional in the strict and proper acceptation of the term; in a lower sense it may, viz. When it militates with the spirit, contradicts the analogy, or defeats the provision of other laws, made to regulate the form of government." [Paley, 350.]

And "the parliament may, unquestionably be controuled by natural or revealed law proceeding from divine authority. Is not this authority superior to any thing that can be enacted by parliament? Is not this superior authority binding on the courts of justice? [1. Wilson, Lec, 400.]

But, in England, is there not an inconsistency in the judicial power undertaking to declare an act void, when the judicial power in the last resort is a branch of the parliament?

Would the house of Commons not impeach the judiciary who would undertake to declare an act of parliament void; especially that house of commons who enacted the law? [Cambden, Pol. tr.]

Has there been any instance of the judicial power in England, undertaking to declare an act of parliament void?

But we have a written constitution; a law inconsistent with this must be void. But who shall determine whether it is inconsistent? This is the difficulty.

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"It is emphatically the province and duty of the judicial department, to say what the law is. If two laws conflict with each other, the court must decide on the operation of each. So if a law be in opposition to the constitution: both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary acts, must govern the case to which they both apply."

"The oath of office imposed by the legislature, is demonstrative of the legislative opinion on this subject." [1. Cranch. 180. Chief Jus. Marshal.]

It will be noticed that the oath of office to the state judges is different in Pennsylvania. The like argument cannot therefore serve them in the exercise of this power.

I have seen this point canvassed in a report of a decision in a superior court of Virginia, where the judges, three to two, determined in favour of the exercise of this power, in case of the law of the state, conflicting with the state constitution; but I have not the report. My impression is, that it was the best discussion of the subject I have seen, and my judgment was with the minority at the time.

"If any act of Congress or the Legislature of a State violates constitutional provisions, it is unquestionably void, though I admit, that, as the authority to declare it void, is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case." [3 Dall. 399.]

"The more minute the transgression, the more to be resisted, as being more likely to elude vigilance."

[Strictures in the gazette by Judge Cooper.] The quotation is from memory.

"It is an unpopular act only, then, that might be declared unconstitutional." [Anonym. Pamph. observing on the position I had laid down on this point.]

Judge Wilson [Sec. 456.] styles this "*a delicate and embarrassing subject*." And this, even though it is with regard to the judicial power under the constitution of the United States, that he speaks; in which case, I think there is less doubt. The inclination of his mind appears to be in favour of the judicial power, exercising the authority to declare void, an act which is manifestly repugnant to the constitution.

Judge Patterson, in the Circuit Court, United States, [3 Dall. 308.] lays it down, that "in England the authority of the Parliament runs without limits, and was above control." Some of the Judges there, had the boldness to assert, that an act of parliament made against natural equity is void; but this opinion contravenes the general position, that the validity of an act of parliament cannot be drawn into question by the judiciary department: it cannot be disputed, and must be obeyed. But in England there is no written constitution, by which a statute can be tested. Here the case is widely different."

I take it, the English lawyers will not admit this; and I am not sure but that the constitution there, is as fixed in principle and usage, and can be ascertained from documents as well as here.

But to notice farther the authority of judge Patterson, he takes it to be "a clear position, that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. The judiciary in this country is not a subordinate, but co-ordinate, branch of the government. But I take it, the judiciary is just as much so in England.

In the case of Horns lessee against Dorance, the judge exercised the power, of declaring an act void. I do not know that it can affect the principle; but there was greater reason for the exercise of this power, which was in the case of an act under the constitution of '76, where the whole power was in a single house.

I have seen a short report of a case in the hands of the Attorney General, (present) in which the then Chief Justice, the late governor M'Kean, seemed to take it, pro concesso, that the Judiciary had a right to exercise this power; and I think the act in that case, was under the constitution of '76. Nevertheless, notwithstanding this, the last, though not the least authority, I do not know that I can distinguish the power under one constitution, from that, in point of principle; yet, I consider it still, as very delicate ground to tread upon; and, unless in a very outrageous case, not perfectly safe, for at least a state judge who is *within striking distance* of the legislative body, to attempt it. He must be sure that the feelings of the public mind are with him, and will bear him out.

I have enquired of a leading member of the State convention which framed the constitution, how it came to pass that, as this was a vexed question in the theory of government, even under the written constitutions of the States, the power had not been expressly assigned to the judiciary, of testing a statute by the constitution; his answer was, that it was thought that if the principle had been brought broadly in view, it would have been rejected, and it was thought more advisable to leave it to be collected by construction.

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It must certainly shock the public mind a little, to have it thought, that, after an act solemnly enacted by two bodies, deliberating apart, and the review of a governor, the only immediate representative of the whole people, three perhaps out of four individuals who constitute the supreme court, or a circuit judge of the United States, or the supreme court itself of the Union, should declare the Statute void.

Judge Tucker in his Blackstone, seems to lean in support of the principle, as founded in rational theory, and as a desideratum in practice: and under the constitution of Virginia he takes notice, that "more than one instance might be adduced, where the judiciary department have doubted, or denied the obligation of an act of the legislature, because contrary to the constitution." He refers to "the case of district court clerks, in the court of appeals, May 12, 1783: and of *Thamter* against *Hanokins* in the general court November 11, 1793, [1. vol. append, 81, and 95.] where he gives the argument of Judge Wilson in this case, and observes "that nothing can be more conclusive;" and remarks, that both the judiciary, and the legislature, have on several occasions recognized this power. The legislature have repealed laws, assigning as a reason, the being *contrary to the constitution*: and it now seems settled in all the superior courts, "that wherever the constitution, and an act of the legislature are in opposition and cannot exist together, the former must controul the latter." But Quere, have the legislature recognized the power of the judiciary to repeal, by declaring void? It would seem so, in that State, by the acquiescence. It has never yet been tried in Pennsylvania. The power of impeachment or removal by address, does not seem consistent with it. In Virginia, the trial of an impeachment is differently constituted.

If with us it is the duty of the judiciary to examine the constitutionality of a law, it may very plausibly be said, with Judge Cooper, that the minutest transgressions are to be the most watched. As the Physicians say, *absta principis*; and Vattel may be quoted "It is very uncommon to see the laws and constitution of a State, openly and boldly opposed. It is against silent and slow attacks, that a nation ought to be particularly on its guard." [Law of Nat. B. 1, 3. act. 30.]

The *Federalist*, a publication of great merit, applies the law of a "*delegated authority acting under a commission*" to the case of a legislature under a constitution, and as in the one case, so in the other, a transgression must be void. And "if it be said that the legislative body are themselves the constitutional Judges of their own powers, it may be answered that this cannot be the natural presumption, when it is not to be collected from any provision in the constitution." But neither is it to be collected that the judiciary are, but by inference, on the ground that they are expositors of laws; and that the constitution is a law paramount. But supposing it to be exercised, I take it, that it must be a matter of discretion with the courts, to say in what cases; and that they must be answerable for the abuse of it; and this proves, that it cannot be in ordinary cases, that they will exercise it. It must be clear, that there is a *principium*, before the *absta principis* can be applicable. An apparent *slight deviation* from the right line, which is not observable to the optics of all without glasses, will not justify an interference with the march of the legislative body.]

CASES

IN THE

Court of Common Pleas,

OF THE

NINTH JUDICIAL DISTRICT.

ADAMS COUNTY, APRIL TERM, 1810.

COMMONWEALTH against LINDSEY STURGEON.

NEGRO HENRY, being a free man about twenty-four years of age, bound himself to the defendant by indenture of apprenticeship, to learn the tanner's trade. The indentures were unexceptionable in point of form, and regularly executed. The only question which came before the Court, was, whether a free person of full age can bind himself an apprentice, so as to be held to personal servitude, and subject to the provisions of the act of Assembly, giving summary jurisdiction in disputes between master and apprentice.

A person of full age, binding himself apprentice, to learn a trade, is not subject to the provisions of the act of assembly giving summary jurisdiction in disputes between masters and apprentices.

Cassett and Maxwell, for the master.

It is admitted that by the common law, persons capable of contracting, can be compelled to fulfil their undertaking, only by an action on the covenant or promise; but it is at the same time assumed, that the Legislature can by law enable men to bind themselves, so as to be subjected to summary proceedings and personal servitude. This is the case with indented servants, who, though bound voluntarily, are

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compellable to render personal services in discharge of the covenants in their indentures. This is indeed admitted as it respects minor apprentices, but denied as it regards those of full age. Yet it would seem strange, that the Legislature should intend to subject minors, who, by the common law, generally speaking, are not liable on their contracts at all, to a more severe and literal compliance, than adults, whose power to bind themselves, has never been questioned. Unless the law explicitly enjoined it, we could hardly suppose that it could have been intended, that infants, who are refused the power of assenting to contracts, should be more strictly bound, than those who have always been regarded as capable of incurring binding obligations.

By the common law, persons of full age might bind themselves apprentices, (a) and they were liable to an action of covenant for not complying with the terms of the indentures. This was the only remedy for the master, and therefore minors were not answerable for departing their master's service, as the deed of an infant creates no legal obligation; and hence it has been said that by the common law, without special custom, an infant *cannot bind himself to be an apprentice*, (b)

By 5 Elizabeth, c. 4. It is provided, that a minor may bind himself an apprentice by indenture, *as amply and fully to every intent as if he had been of full age*. The construction of the statute has been, that the minor should be subject to, and have the benefit of the summary jurisdiction given to the Quarter Sessions, in disputes between master and apprentice, but that he should not be liable to an action of covenant. (c) As then minors cannot be liable to an action, we should in vain look for that similitude of conditions, between those bound over, and those under age, which the statute contemplates; unless it exists in the summary jurisdiction and personal liability being equally applicable to both. The proviso in the statute, that none but minors shall be bound to enter into articles of apprenticeship, &c. implies, that minors may be bound contrary to their consent, by their guardians,

(a) 4 Com. Dig. 94.
(c) Cro. Car. 179.

(b) 2 Cro. Rep. 494.

overseers of the poor, &c. but will it be contended, that guardians can bind their wards more extensively, than their wards could bind themselves after they come of full age? It would be exceedingly frivolous to say, that this provision in favour of minors, which only puts them on a footing with adults, ought to be construed so as to exclude the latter description of apprentices from the provisions of the statute altogether.

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By the act of General Assembly, regulating apprentices, some further provisions are introduced. It is to be remarked, that the title of the law, and the introductory part of the first section, respects apprentices of every class and character. The object of the law is, "the regulation of apprentices; to regulate their conduct, &c. to prevent them from departing their master's service, to make the covenants between them mutually obligatory, &c.(a) and then, in the latter part of the first section, minor apprentices are put on the same footing with those who are bound when of full age, so that they shall serve their times as fully as they would have been bound to do, if they had been of full age at the time of making their indentures.

As the first section of the act is confined to express what are the evils to be remedied, and to the putting of apprentices, who are bound while minors, on a footing with those of full age, it was to be expected that all distinction would be dropped in the phraseology of the subsequent part of the act, if the distinction itself was understood to have been done away. Accordingly we find it no more alluded to. The language of the remaining sections is general, comprehending the character and relations of master and apprentice of every description; providing a summary remedy for each, and prescribing in what manner they shall be bound to answer at the sessions. If it was not intended that all kinds, whether minors or those of full age, when bound should be subject to the summary process, we would expect to have found some express, or at least some implied exception; but, on the contrary, every thing that is either expressed or implied, in the

(a) 1 Dall. Edit. Penn. Laws, Vol. 540.

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act, seems to favour the opinion that both kinds of apprentices, those of full age and those under age, are equally comprehended. It has been urged that the term *apprentice* implies *learner*, and that the latter term implies a youth or *minor*, and that therefore it is presumable that none others than infant apprentices were contemplated in either the statute or act of Assembly, so as to make them subject to summary jurisdiction. This reasoning, on the face of it, is too frivolous to challenge a serious refutation, as, in logical analogies, it is obviously deficient both in premises and conclusion; but, independently, the act as well as the statute recognizes apprentices over age as well as those under, in the most express terms; and it would be rather too bold to say that those laws are to be confined to minors, when the laws themselves expressly declare, that both minor and adult apprentices are comprehended in at least some of its provisions; and no distinctions any where even implied. It must also be necessarily inferred, that apprentices of full age are comprehended in the act of assembly, from the provision, that in certain cases the apprentice is to be bound in a recognizance, which would be entirely nugatory as respects minors, unless it could be supposed, that the legislature intended to repeal a fundamental and very important principle of the common law, by a very remote implication.

It does not appear to be denied, that apprentices above age have the advantage of the summary remedies provided by the act against their masters; and, unless the law has been made exclusively for the advantage of the apprentice, the principles of reciprocity would require that each party should be equally benefitted by it. The provisions, as expressed, are for their mutual benefit, and moreover are intended to provide a *mutuality*, as appears from the first section. Indeed, if the act is to be construed to embrace only minor apprentices, it will become necessary to impute a very awkward and obscure, not to say unintelligible phraseology to the assembly of one thousand seven hundred and seventy.

It might be added, that the term “apprentice” is technical, and implies a peculiar set of duties, rights and relations,

and if a person above age voluntarily enters into this relationship, and takes upon himself the duties and character, in order to entitle himself to the rights belonging to it, sound policy and a fair exposition of the laws seem to encourage and authorise, rather than forbid his becoming an apprentice in fact as well as in name.

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PER CURIAM.

Hamilton, President.

To decide this question it is necessary to consider the existing evil and the remedy extended when the act under consideration was enacted.

By the common law, no persons under twenty-one years could bind themselves apprentices in such a manner as to entitle their masters to an action of covenant, or other action, for departing their service or other breach of indentures.

This statute enacted that the apprentice, although within twenty-one years of age, shall be bound to serve as amply as if of *full age*. This induced a belief that the infant was liable on the covenant after he came to full age, but the contrary was decided afterward in 5th of Charles the first, in the case of Gilbert against Fletcher; (a) but that if he misbehave, he may *complain* to a *justice according* to the statute to have *him* punished.

The minority of the apprentice is recognized in the statute of 5 Elizabeth, so far that no person shall, by form or colour of this statute, be bounden to enter into any apprenticeship, other than such as are *under* twenty-one years of age.

From these acts, and the construction put on them, it would appear reasonable to conclude that the portion of the 35 sect. of 5 Elizabeth, giving a summary power to a justice of the peace, with an appeal to the sessions, as it has since been construed, to settle differences between the master and apprentice, is limited to apprentices bound under age, there being no resort to the covenant of the apprentice, even after

(a) Cro. Jac, 179.

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coming to full age; this system of summary power became indispensable.

When an apprentice had broke his covenants by running away, if no person had become bounden for him, the only remedy, if his person could not be seized, was in the earnings of the apprentice, which, it was decided, belonged to the master, as in the instance of Prize money and other cases in the books.

By the statute of George the 3d, an additional remedy is given to the master, obliging the apprentice to serve a term, equal to the time he had absented himself, over and beyond the term of his apprenticeship; but the application of the master to compel satisfaction, must be made within seven years after the end of the term.

Our act of assembly of 29th December, one thousand seven hundred and seventy, is, in substance, a copy of that portion of the 35 sect. of 5 Elizabeth intended, as the preamble mentions, to make the covenants mutually obligatory between the master and apprentice; the chief object of the act, is to oblige apprentices to perform their duties, and serve till twenty-one years of age. A late act of this state further prescribes a remedy for the master, by giving an action of covenant to the master after the apprentice arrives at full age.

When it is considered, that the term *apprentice*, signifies a learner, and impliedly therefore looks to youth and a minority and that all the provisions in the different statutes in England and here, bear constantly on a state of minority, it would seem to follow, that the penal part of our act of assembly before mentioned, and the provisions therein given, are necessarily limited and restrained to persons within age.

In contracts between persons of full age, a master and a person willing to be instructed in the character of apprentice, the agreement is to be carried into effect as all other contracts, according to the stipulation of the parties. It is not to be inferred, that in such case, from the term apprentice being used, imprisonment at hard labour (the punishment of felons) may follow the breach of the covenants.

Our act of assembly enforces a service till twenty-one years of age of males, and of females till eighteen; and all the provisions must be predicated on allowing and effectuating that end. Can it be said that an agreement between a master and a man of thirty or forty years of age, to learn the art of brewing, or any other trade, calling or occupation, by the name of apprentice, that such a person, is within the scope, spirit and meaning of the act of one thousand seven hundred and seventy?

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It may be expedient to extend the remedies in the case of minors, as in the statute of George 3d, but cases, of persons above age, in this state, becoming apprentices, are so rare, that the construction now given can be of little inconvenience; whilst on the contrary, to subject persons, who on equal terms became parties to the contract, to the power of the sessions by a disgraceful punishment for a breach of duty, appears harsh and inexpedient.

This construction, I admit, is not conformable to a case reported in Browne's Cases in the Common Pleas of Philadelphia county, before Judge Rush.(a) That decision is of authority, and every deference is due to so respectable a judge, and it induced this court to postpone its determination.

I am informed however, that Mr. Recorder Wilcox, determined differently. There has been also a late decision in the Mayor's Court, I understand in conformity to the opinion of Recorder Wilcox; and this highly respectable opinion I might also mention, if authorised.(b)

Under all these considerations I am of opinion that Negro Henry be discharged, it appearing that he was of age at the time of the contract, and consequently that recourse must be had to the covenants, if any breach of any of them in the indenture, and that the summary remedy in such case before a Justice does not apply.

(a) 1 Vol. 24

(b) Vide 1 Browne's Rep. 374, in note.

MAYOR'S COURT

OF THE

CITY OF PHILADELPHIA.

1811.

March 9th

COMMONWEALTH *against* HILL,

The Mayor's Court discharged a recognizance, entered into before the Mayor of the city of Philadelphia, by a husband, on the application of his wife *alone*, and complaint that he had deserted her.

APPPLICATION by Susannah Hill against her husband Hugh Hill, for an order of maintenance, under the 30th Sect. Poor Law, of the 29th March 1803.

The recognizance taken before the Mayor, and returned to the Court was entitled as follows.

Commonwealth
against
Hugh Hill.

} Nov. 1, 1810. Charged on
oath of Susannah Hill, &c.

Addis, moved to discharge the recognizance of Hugh Hill the defendant, on two grounds, viz.

1st That it did not appear on the recognizance taken and returned, that the wife was deserted so as to become a public charge : and,

2ndly That the application to the Mayor was not on behalf of the guardians.

Per CURIAM.

Reed, Recorder,

The practice of the magistrates, and of this court, appears to have been various ; in some cases, the wife has applied without the agency or interposition of the guardians of the poor ; and the orders in such cases have been, to make payments to her, but at the same time limiting the continuance of them, to the time she continues chargeable ; in

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against
HUGH HILL.

many instances, the order has been made on the application of the guardians, and the payments directed to be made to them, for the support of the wife. The Preamble to the 30th Sect. (a) recites the mischief for which the enacting clause provides the remedy. [The words are, whereas it sometimes happens that men separate themselves without reasonable cause from their wives, and desert their children, and women also desert their children leaving them a charge on the said city, district or township, although such persons may have estates which should contribute to the maintenance of such wives and children:] The first part of the section directs the mode of proceeding when the husband has property, and then, as was admitted on the argument, the wife or children must be *left or neglected*, so as to become a public charge. This connection is preserved throughout the section, which in the latter clause, provides a remedy against the person of the husband, where no property can be found. The great object of the poor law is the maintenance and support of the *poor*, and none others, and, when it can be obtained, indemnity to the public against persons chargeable, or likely to become so. In this case, the woman never having been a public charge, no application was made to the guardians for relief, and they, of course, could make none to the magistrate; at the time therefore when this recognizance was taken, there was no fact to authorize the binding over, and, as the wife has not been since that time, to use the words of the law, so neglected as to become a public charge; the guardians of the poor cannot now interpose their authority, to sustain the application. Whether these facts should appear on the face of the recognizance is quite another question, which on this occasion it is unnecessary to decide: we would, however, by no means be understood to say, that it is necessary. As at present advised, we see no reason why the court should not either hear evidence of the facts, or if necessary, permit the magistrate to amend the return. For the reasons mentioned, and on

(a) 7 vol. Bioren's ed. 123.

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the authority of the decision of Mr. *Levy*, formerly recorder of this Court, and Mr. *Rush*, President of the court of quarter sessions of Philadelphia County, the court quash the recognizance and discharge the defendant.*

Recognizance quashed, and defendant discharged.

Mr. *Dallas*, when recorder, decided, that the application might be made by the wife alone. Mr. *Levy*, who succeeded him, declared, that in consequence of this decision, he gave the subject the most mature consideration, and much as he respected the opinion of his predecessor, he was obliged to differ from him. President *Rush* inclined to Mr. *Dallas's* sentiments, but when the question was brought before him, on the authority of Mr. *Levy's* opinion, he decided as he had done: Indeed, he went further, and said, that the facts must appear on the record.

REPORTER.

CASES

IN THE

District Court,

FOR THE CITY AND COUNTY OF PHILADELPHIA,

SEPTEMBER TERM, 1812.

CLEMON *against* BEAUMONT.

1812.

September 12.

BEFORE the return of the writ, the plaintiff expressed his determination to have arbitrators chosen agreeably to the act of the 20th of March, one thousand eight hundred and ten. The arbitrators were chosen accordingly; and an award was made and entered upon the docket previous to commencement of June Term; at which term "*non est inventus*" was returned by the sheriff, to the writ of *capias*. At September Term following, the defendant's attorney obtained a rule to shew cause why the judgment should not be set aside in consequence of the above return.

An award of Arbitrators regularly made, is not affected by the return of *non est inventus* subsequently made by the sheriff to the *capias* by which the action was commenced.

No objection was made to the award for want of notice, or any irregularity in the proceedings.

After argument the court gave the following opinion.

Hemphill, President.

In the case of Hertzog against Ellis, (a) a majority of the Judges of the Supreme Court, in giving a construction to the arbitration act of the 20th March one thousand eight hun-

(a) 3 Bin. Rep. 212.

1812. **CLEM ON**
vs. ONST
BRAUMONT. dred and ten, have said, that an action is *entered* within the meaning of the act, from the time that it is placed on the prothonotary's docket; and in that case the Chief Justice says, that where the reference is entered before the first term, the suit may be carried on without an appearance in Court at all. In consequence of the above decision, this Court, in the case of Thomas against Hopkins (a), determined, that a rule of reference might be entered the same day on which the *capias* issued. It necessarily follows from these decisions, that the proceedings may be carried on, and that an award may be made before the first term. Indeed the party, after entering a rule of reference, is subjected to a penalty if he does not proceed: and, by the 10th section, the award, after being entered on the docket, is to have the effect of a Judgment, and to be a lien until such judgment be reversed on an appeal. The Court are of opinion, that the Judgment thus legally obtained ought not to be affected by the subsequent return of the writ. The act requires notice to be given to the opposite party, of the time of choosing the arbitrators; he has therefore the same opportunity of making his defence before the arbitrators, that he would have in Court after the service of a summons, when no rule of reference is taken out.

The manifest object of the act is to facilitate the administration of justice, and to enable the parties to conduct their own suits: the mere formality of the proceedings did not particularly attract the attention of the Legislature.

A judgment before the first term, in the case of a *capias* which is afterwards returned *non est inventus*, exhibits a novel appearance in judicial proceedings; but it arises entirely from the institution of a new tribunal, before which the cause is withdrawn from this court by virtue of the rule of reference. The award is to be entered on the docket by the officer of this court, and is then to have the effect of a Judgment; it is not even to be approved of by the Court. It cannot therefore be correctly called a Judgment pronounced by this Court before the return of the writ. Although

(a) Ante.

in the case of Ebersoll against Krug, (a) it is considered as the Judgment of the Court from the time of its entry on the docket, and as such to be liable to a writ of error. When the arbitrators are properly appointed and their tribunal legally organized, the power of this court over the action is principally suspended until the dissatisfied party appeals. Perhaps it would be the duty of the court to interfere whenever the arbitrators neglect or decline to proceed for an unreasonable length of time ; or when the award made is not entered according to law ; or where it so uncertain or irregular as to be incapable of operating as a judgment.

The rule in this case is directed to be discharged.

Rule discharged.

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WYCOFF
against
CORLESS

WYCOFF against CORLESS.

September 19.

THIS action had been arbitrated, and an award was made in favour of the plaintiff: the defendant appealed and obtained a verdict in his favour. In the bill of costs, the defendant claimed one dollar per day for each and every day lost by him in attending on the appeal, by virtue of the act of the 20th of March, one thousand eight hundred and ten.

The party acquiescing in an award of arbitrators is not subjected to the payment of one dollar per day to the party appealing who obtains an award in his favour.

PER CURIAM.

Hemphill, President.

The claim of the defendant does not appear to be supported by the act, the 12th and 14th sections of which, place the plaintiff and defendant upon terms of equality. By these sections, if either party appeals and does not obtain a verdict

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more favourable to himself than the award, he is obliged to pay the costs of the appeal, and also one dollar per day to the opposite party, during his attendance on the appeal.

This provision of the act is evidently intended to operate as a kind of penalty for endeavouring, without any good reason, to disturb the award: it is therefore, contrary to the spirit, as well as to the letter of the act, that the party acquiescing in the award shall be subjected to bear the like expenses.

The sum charged in the Bill of costs for the daily attendance of the defendant must be stricken out.

THE CASE OF WILLIAM LITTLE.

An alien enemy has a right to make his declaration of intention of becoming a citizen; but not to be naturalized.

ON motion of *Bache* and *Browne*, William Little, a subject of the United Kingdom of Great Britain and Ireland, and who came hither in the year 1808, claimed to report himself under the second section of the Act of Congress passed the 14th day of April 1802, (a) and to declare his intention of becoming a citizen of the United States.

Hare and *M. Levy*, as *amici curiæ*, suggested their doubts whether the wishes of the said William Little could, legally, be complied with. They read the first proviso of the fourth condition of the first section of the above mentioned act, which declares, that no alien who shall be a native, denizen or subject of any country, state or sovereign, with whom the United States shall be at war at the time of his application, shall be then admitted to be a citizen of the United States; and they contended, that, as the making of the declaration of intention to become a citizen and the report, were the means whereby an alien obtained his naturalization; and as the United States was then at war with the Kingdom of Great Britain, the place of the applicants nativity; and the above

(a) 6. V. L. U. §. 78.

mentioned proviso denied him the *end*; the court would feel themselves justified, in refusing him the *means*. That admitting that a person had a right to expatriate himself in *time of peace*, it by no means followed that the same privilege was allowed in *time of war*.

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William Little was a subject of the King of England; and, as respected the United States, he was an *alien enemy*. They asked, would the United States receive his proffered allegiance, which included in it an act of *treason* to his legal sovereign? would foreign nations respect naturalizations made under such circumstances? They would venture to say, that even neutral nations would not; much less would the nation with whom we are at war.

The act of Congress declares, that he shall not be permitted to perfect his naturalization, *during a war with the nation to which he belongs*; and will the Court allow him to declare that he *intends* to do it? The law, in time of war rejects his *oath of allegiance*, why should the *oath of his intention* be received? If one person might make his declaration, so might another, and thus a whole colony of alien enemies might be transplanted among us; and, if the Court would allow them to make their declarations of intentions to become citizens, they would possess themselves of large tracts of our country. *Eui bono*? What good purpose was to be answered, by allowing the declaration to be made? an alien enemy could have no civil rights; he could bring no action, real, personal, nor mixed; and where there is no *remedy* there is no *right*.

They suggested, that it bore a suspicious aspect, that a foreigner should have resided some time in the U. States when we were in a state of peace, without taking any measures to be naturalized; and that, after war is declared with the nation to which he belongs, and a few days before a general election, he, for the first time, makes this his application. That having obtained the certificate of this Court, they would not be surprised to hear, that in the darkness of night, and amidst the rage of party spirit, it had been made use of to very improper purposes.

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Bache and Browne, contra, did not in the least object to any gentleman of the bar, or any citizen, (a) submitting his sentiments to the court on a question agitated before them; but they could not help expressing their regret, that their learned opponents had not confined themselves to a sober argument of the case. In favour of counsel retained in a cause, and who are supposed to have imbibed the feelings and passions of the clients they represent, many grains of allowance are to be made for the warmth of expression; but from those who volunteer their services as *disinterested friends of the Court*, such expressions are not to be tolerated; it led them to suspect that the learned gentlemen were actuated by that rage of party spirit, which they had professed so much to reprobate. They were determined however not to follow their example but to confine themselves to the question before the Court.

The act Congress of 1802 allows every free white person to become a citizen of the United States, upon four conditions.

1st, That, three years before his application, he shall have declared his intention to become a citizen.

2ndly, That he shall, at the time of his application, take the oath of allegiance to the United States, and make a renunciation of his allegiance to his former sovereign.

3rdly, That he shall satisfy the Court that he hath resided within the United States five years, and one year in the state where he applies to be admitted; and that during that time he has behaved himself, &c.

There is a proviso to this condition, that the oath of the applicant, shall, in no case, be allowed to prove his residence.

4thly, That he shall renounce all titles of nobility, &c.

These are the general regulations relating to all aliens applying to be made citizens, whether they came to this country before or after the passing of this act. As regards those who have arrived in the United States after the 14th April one thousand eight hundred and two, the second section contains this additional direction, "that they shall

(a) If a judge is doubtful or mistaken in the law, a stander-by may inform the Court as *amicus curia*, 2 Co. Inst. 178.

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report themselves in the manner therein specified." The certificate of this report they must exhibit when they apply to be naturalized, as evidence of the time of their arrival. It appears therefore that the court, in all cases, must be satisfied of the residence of the person applying to be naturalized: but Congress have made a very material distinction, between the kind of evidence to be received from a person coming into the United States before, and one coming after the passing of this act. The first may prove his residence, by any evidence other than his own oath; the last must produce the certificate of his report, made in conformity to the said second section. William Little came hither since the fourteenth of April, one thousand eight hundred and two, and will the court refuse him the liberty of perpetuating the testimony of his residence, when, if he shall hereafter apply to be naturalized, none other can be received? Why should this be done? It is said, that the first proviso of the fourth condition of the first section, denies him the end, and therefore this court will withhold the means. That proviso will prevent his naturalization, in case only that the United States shall be at war with his nation, at the time of his future application to be naturalized, "with whom the United States shall be at war at the time of his application," and it withholds the privilege only during the war "shall be then admitted to be a citizen &c. How long this war will continue we know not; during its continuance, the present applicant cannot be admitted to change his allegiance; but suppose our gallant little navy should capture some of those hitherto reputed invincible ships of war, with which proud Albion claims to give laws to the world. Suppose our citizen soldiers should plant the American standard on the walls of Quebec. Suppose our haughty foe, as much humbled by adversity, as they are now elated by prosperity, should sue for and obtain, from the United States, an honorable peace; in that event, the right of William Little to shake off that allegiance which he owes to George the Third and the Prince Regent, by no choice, but by the circumstance of his having drawn his first breath in the much persecuted Kingdom of Ireland, will revive; and if this Court do not prevent him, by refusing to allow him to make his declaration, and

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to report himself according to law, he will be received among us. There is no impropriety in allowing him to declare his intention to become a citizen: his declaration is subject to the condition in the act, namely, that we shall not be in an actual state of war with England, *at the time of his application to be naturalized*. But, it is said that such an allowance would hold out an inducement to a colony of alien enemies to come among us, and possess themselves of large tracts of land. The mildness of our government, and the justice of our laws will always encourage foreigners to settle among us; allowing them to report themselves, holds out no greater inducement, for it creates no right, of holding property or otherwise. An alien *enemy* can hold no land in Pennsylvania. The act of assembly made in favor of aliens, (a) expressly excepts *alien enemies*.

What good purpose can be answered by allowing an alien enemy to report himself, ask the opposing counsel. One public good will certainly flow from the measure; it will discover the intention with which these aliens remain among us, and will serve to guide the President in the exercise of the unlimited power, given to him by Congress in a late act, of sending all alien enemies out of the Country. As therefore there was no public or private evil resulting from it, but otherwise; and as it was allowed by the words of the act of Congress, they hoped the court would permit the applicant to make his report and declaration.

PER CURIAM.

Hemphill, President,

By the act of Congress of the 14th April, one thousand eight hundred and two, and the Act in addition thereto, passed the 26th of March, one thousand eight hundred and four, all aliens, being free white persons, and who may have arrived in the United States after the 14th of April, one thousand eight hundred and two, may be admitted to citizenship on their compliance with four conditions.

(a) Passed 16th February 1807. Purdon's Dig. 3.

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1st, The person applying shall have declared, on oath or affirmation, before the supreme, superior, district, or circuit court &c. three years at least before his admission, that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever, all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject.

2ndly, That he shall, at the time of his application to be admitted, declare, on oath, or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States; and that he doth absolutely and intirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof he was before a citizen or subject.

3dly, That the court admitting such alien, shall be satisfied that he has resided within the United States five years at least; and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction, that during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.

4thly, That in case the alien, applying to be admitted to citizenship, shall have borne any hereditary title, he is to make an express renunciation of the same, in the court to which his application shall be made.

By the second section of the act of the 14th April, one thousand eight hundred and two; aliens, arriving after the passing of the act, in addition to the foregoing directions, are required to make registry and obtain certificates in the manner therein prescribed, to wit, any person desirous of becoming naturalized, shall, if at the age of twenty one years, make report of himself; or, if under the age of twenty one years, or held in service, shall be reported by his parent, guardian, master or mistress, to the clerk of the district court; and such report shall ascertain the name, birth

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place, age, nation, and allegiance of each alien, together with the country whence he or she migrated, and the place of his or her intended settlement ; and it shall be the duty of the clerk, on receiving such report, to record the same in his office. The evidence to be received, on the admission of such aliens to citizenship, is,

First, the certificate of registry as evidence of the time of arrival within the United States.

Secondly, the record of the declaration of intention to become a citizen.

Thirdly, Satisfactory proof by disinterested witnesses, that the residence of the alien has been in conformity with the Act ; and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States.

The acts and conduct of the alien must correspond with the requisite evidence ; he must make the registry, which may be done before the clerk, in vacation, or before the court in Term time—he must make his declaration of intention, which must be done in open court ; but may be made at the same time of the registry, or at a different time ; he must reside ; he must be of good moral character, and remain attached to the constitution ; and

Lastly, He must make his application to be actually naturalized.

It is the last step only, which the proviso, in the first section, forbids the alien to take, whenever the United States is at war with the country, state or sovereignty, of which he is, at the time, a native citizen, denizen or subject ; it refers expressly to the time of his application to be admitted to become a citizen.

This construction, it is apprehended, is by no means irreconcilable with the policy of the naturalization laws ; for how can any harm or danger ensue to the United States, from the act of the alien in making the registry of his arrival, whereby he will be better known ; or in declaring his intention of becoming a citizen, when he gains no personal privileges in consequence thereof ; and when the President of the United States, by virtue of the Act of the 6th of

July one thousand seven hundred and ninety eight, may, at any time during the war, secure and cause him to be removed as an alien enemy.

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If, after the war with his nation is over, on his application to be admitted to be a citizen, he shall be able to satisfy the court that he has preserved a good moral character, and has been attached to the principles of the constitution while hostilities existed, his claim to citizenship will be equal, if not greater than could be acquired by a similar demeanor and disposition in time of peace. The court are of opinion, that Mr. Little may be permitted to make his declaration of intention to become a citizen.

A question has also been made, whether an alien enemy can, under any circumstances, be admitted to citizenship, *during the war*.

By the first section of the Act of eighteen hundred and two, and the first section of the Act of eighteen hundred and four, aliens, who had been in the United States at and during certain periods previous to the 4th of April eighteen hundred and two, were entitled to be admitted to become citizens, without a compliance with the first condition, specified in the first section of the Act of eighteen hundred and two; neither were they obliged to make registry of their arrival; but it is not to be inferred from any part of these acts, that such aliens may be admitted to citizenship, *during a war*. The court are of opinion, that no alien who is a citizen or subject of any state or kingdom at war with the United States, can be *actually naturalized during the existence of the war*.

SYKES against SUMMEREL.

November 14.

IN this case the plaintiff declared upon an *indebitatus assumpsit* for work and labour as a seaman on board the defendant's ship, and also upon an *indebitatus assumpsit* and *men who had signed shipping articles and who being taken sick in the service of the ship, is left in another port, and is unable to rejoin the ship, provided he receives no wages in returning in any other vessel.*

Indebitatus assumpsit will lie to recover the wages for the whole voyage of a sea-

1812. *quantum meruit*, generally, for work and services performed by him for the defendant.

SYKES.
against
SUMMEREL.

It appeared in evidence, that the plaintiff was engaged as a seaman on board the defendant's ship, for a voyage from Philadelphia to Port-au-Prince and back. On the return voyage the ship was in danger of springing a leak; and it was agreed to proceed to Charleston, South Carolina, that being the nearest port. From that place the ship returned to Philadelphia, without the plaintiff. The plaintiff claimed wages for the whole voyage, alleging that he fell sick in the service of the ship; and was unable, on account of his sickness, to rejoin her when she left the port of Charleston; and that he had not been able to earn any wages in returning home.

The law was not controverted, that if the plaintiff had fallen sick in the service of the defendant, and was not able to rejoin the ship on her sailing from the port of Charleston, he (the plaintiff) in that case would be entitled to wages for the voyage, deducting the wages, if any earned, in returning in another ship; but, on the other hand, if the plaintiff had deserted, the wages previously earned were forfeited.

The facts were left to the jury; and they found in favour of the plaintiff for the wages of the whole voyage. Previously to the trial, notice had been given to the defendant, to produce the shipping articles, but they were said to have been lost and not within his power. During the trial, the defendant's counsel suggested that the plaintiff had misconceived his action; that he ought to have declared on the special agreement; and should have set forth, in his declaration, the reason why he had not actually performed work and labour during the whole of the voyage. This point was reserved, with liberty to move for a *non suit*.

Upon a Rule to shew cause why there should not be a new trial, it was insisted, on behalf of the defendant, that the contract remained open, and that in such cases the plaintiff must declare on the special agreement. In support of this principle, several authorities were cited.(a) On the other

(a) 1 Chitty Pleadings, 338-9, 341. 2 East. Rep. 145. 1 Doug. Rep. 23. Cowp. Rep. 818. 1 Term Rep. 133. 2 Bosanquet and Puller 351. 1 Sir. Rep. 648.

side it was contended, that where the terms of a special contract have been performed, or the law excuses the performance, a duty is raised for which *indebitatus assumpsit* will lie.(a)

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Per CURLIAM.

Hemphill, President.

What is meant by a contract remaining open, is explained by Judge Buller in the case of *Towers against Barrett*.(b) He says, “ the distinction between those cases “ where the contract is open, and where it is not so, is this, “ if the contract be rescinded, either, as in this case, by the “ original terms of the contract, where no act remains to be “ done by the defendant himself; or by a subsequent assent “ by the defendant, the plaintiff is entitled to recover back “ his whole money ; and then an action for money had and “ received, will lie ; but if the contract be open, the plaintiff’s “ demand is not for the whole sum, but for damages arising “ out of that contract.

A contract may always be rescinded by the assent of both parties ; and the terms of the contract may be such as to leave it in the power of one of the parties to rescind it. The cases on this subject disclose distinctions of considerable nicety.— But the question before us falls entirely within a different class of cases, wherein it is not required that the contract should be rescinded, to entitle the plaintiff to his action of an *indebitatus assumpsit*. The rule is, that when the terms of a special contract have been performed by the plaintiff, the law raises a duty for which an *indebitatus assumpsit* will lie ; but when the contract is executory and to be performed in future, the plaintiff must declare on the special agreement : but under the terms of the special agreement, said to exist in this case, the law allows the wages to go on whenever the seaman falls sick in the service of the ship : nothing there-

(a) Bul. N. P. 139. 1. Wil. Rep. 117. 2 Bin. Rep. 7.

(b) 1 Term 133.

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fore in this case remains executory ; the plaintiff had nothing further to perform ; he had done all the law required of him to do ; and his wages were lawfully earned under the agreement ; of course, agreeably to the rule laid down, the law raises a duty for which an *indebitatus assumpsit* will lie. The present is very distinguishable from the case of Hulle against Heightman.(a) In that case, there was an express stipulation that the seaman should assist in bringing the ship back again, and making her fast in a proper place, before they could make a demand on the captain for the wages due. At the foreign port, after the ship had delivered her cargo, the captain would not give the seamen victuals, but bid them go on shore, saying he could get plenty of their countrymen to go back, for their victuals only, since peace. The captain afterwards requested the seamen to return on board, but they refused, saying it was too late, for they had got the law of him. On the trial, it was contended that the plaintiff could recover, in an action of *indebitatus assumpsit*, for the rate of his wages up to the time he was wrongfully turned out of the ship : but Le Blanc, justice, was of opinion, that the wrongful act of the captain did not rescind the special agreement ; by which the plaintiff was precluded from demanding his wages until the end of the voyage, though it gave a cause of action against the captain, for the tort, whereby the plaintiff was prevented from earning his wages under the special agreement ; and directed a *non suit*. Upon the motion for a new trial, the court were of the same opinion, that the plaintiff could not recover on the general counts ; they held the *non suit* proper, the contract still operating. In the above case, it was not suggested that the terms of the contract had, in contemplation of law, been performed ; the plaintiff only claimed a part of the wages of the voyage, on the ground of the special agreement being rescinded. With regard to the inconvenience said to be experienced by the defendants, when the plaintiff declares on a general count, it may be obviated by proper pains taken on their part, as explained in the case of Kelly against Foster.(b) In this case, from the nature of the

(a) 1 East.Rep. 245.

(b) 2 Bin. Rep. 7.

employment and the known rule on the subject, the defendant must have been acquainted with the ground, on which the plaintiff would rest his claim for the wages of the whole voyage.

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against
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New trial refused.

1812.

November 21st

CORNELIUS against UHLER.

THE real estate of the defendant having been sold by the sheriff, and the proceeds being paid into Court, a contest arose, as to the disposition of it, between the general judgment creditors, and the lien creditors, under the act of Assembly of the 17th of March one thousand eight hundred and six.

The persons claiming as lien creditors, had not instituted actions for the recovery of their claims; or filed their claims within six months after performing the work, or furnishing the materials, consequently their liens did not continue longer than two years from the commencement of the building. After the expiration of six months from the time the work had been performed and materials furnished, and within two years from the commencement of the building, the lien creditors obtained judgments before magistrates, and had transcripts of their Judgments filed in the prothonotary's office; but these judgments and transcripts were posterior to the judgments of the general judgment creditors. The building and lot* were sold by the sheriff, after the expiration of two years from the commencement of the building.

A person claiming as a lien creditor under the act of the 17th of March 1806, had filed no lien nor commenced any suit within six months from the time of performing the work, but had instituted a suit and obtained judgment within two years from the commencement of the building: the building and lot were sold after the expiration of two years from the commencement of the building, and it was held that he had no preference over the general judgment creditors.

* The act of assembly gives a lien upon the "*Building*," but by the following case it appears that the *Lot* on which it is erected may be sold.

REPORTER.

**COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF
PHILADELPHIA—January 4th, 1813.**

Browne against Smith.

Case stated for the opinion of the court.

The defendant on the 20th of March, one thousand eight hundred and six, was seized in fee of a lot of ground, situate on the north side of Cherry-street, between ninth and tenth streets, in the city of Philadelphia, and continued so seized until the sale here-

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It was argued by *Randall* and *Browne* on behalf of the general judgment creditors ; and by *Bradford* and *Todd* for those who claimed as lien creditors.

PER CURIAM.

Hemphill, President.

The Court are of opinion, that if the building had been sold within two years from its commencement, the lien creditors would have had a preference over the other judgment

inafter mentioned ; and so being the owner of the said lot, on the 24th day of September one thousand eight hundred and six, commenced the building of a brick paned house, No. 1, on said lot, and on Cherry-street ; on the 25th day of September, one thousand eight hundred and six, Middleton and Woolley filed a claim against said house for eighty-two dollars thirty-eight cents, for lumber furnished and delivered by them, and used by the defendant, for and in erecting said house, which sum of money is yet due and unpaid, the lumber for which the claim is filed was furnished and delivered, the first of it on the 25th day of March, one thousand eight hundred and six, and the last of it on the 10th day of April in the same year ; the claim was filed within six months after said lumber was furnished and delivered.

That on the 25th of September, one thousand eight hundred and six, the defendant being the owner of the aforesaid lot, commenced the building of a brick three story house, No. 2, on said lot, and adjoining the aforesaid house, also a brick three story house, No. 3, and adjoining the last mentioned house, and a frame stable on the rear end of the lot : on the 30th day of June, one thousand eight hundred and seven, Evans and Warner issued a writ of *capias ad respondendum*, against the defendant, returnable to September term, one thousand eight hundred and seven, to recover against him, according to the directions of the Act of Assembly, for lumber and materials furnished and delivered to the defendant, and used by him for and in erecting the two last mentioned houses and the stable ; the first of which lumber was furnished and delivered on the 9th day of October, one thousand eight hundred and six, and so from time to time until the 4th day of April one thousand eight hundred and seven, on which day the last of the said lumber was furnished and delivered. On the 20th of August one thousand eight hundred and seven, the defendant confessed judgment in the said action to the plaintiffs for one hundred and thirty-five dollars thirty-nine cents, which sum then was and yet is due and unpaid, for lumber and materials furnished and delivered as aforesaid ; that the said suit was instituted within six months after the lumber and materials were furnished and delivered as aforesaid.

That there are judgments against the defendant unsatisfied in the following actions, and of the dates hereafter mentioned, in the Court of Common Pleas of Philadelphia County.

Browne, assignee, &c. against *Smith*.—Judgment confessed on warrant of attorney, October 9th, one thousand eight hundred and six, for five hundred and twenty dollars.

Kline for the use of *Browne* against *Smith*.—Judgment certified from the docket of a Justice of the peace, and filed January 16th, one thousand eight hundred and seven, for thirty-one dollars fifty cents.

Browne against *Smith*.—Judgment confessed on warrant of attorney, January 15th one thousand eight hundred and seven, for three hundred and forty-six dollars.

Same against the Same.—Judgment confessed on warrant of attorney, February 14th one thousand eight hundred and seven, for one hundred dollars.

Cohen against *Smith*.—Judgment confessed on warrant of attorney, March 3d, one thousand eight hundred and seven, for two hundred dollars.

The lot, house and stable aforesaid, were taken on a *fi fa*. issued on one of the judgments in favor of *Browne* the plaintiff ; and by virtue of a *venditioni exponas* to December term one thousand eight hundred and seven, were sold by the sheriff of Philadelphia county for five hundred and eighty dollars.

There was due to the plaintiff on his judgments on the 2d day of March one thousand eight hundred and seven, five hundred and fifteen dollars three cents, bearing interest from that day, which sum is yet unpaid.

creditors, by virtue of the lien given by the act : but the moment the lien expires, their judgments stand unprotected by the act, and can have no other effect than judgments usually have : they were not obtained in pursuance of the act, and of themselves can have no preference over prior judgments. During the two years, the prior judgments would have been excluded by virtue of the lien created by the act, but not in consequence of the subsequent judgments obtained by the lien creditors ; and as soon as that lien ceases, all the judg-

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The question submitted to the court is, whether or not the creditors who claim for lumber and materials furnished and delivered as aforesaid, are to be first paid out of the proceeds of the sheriff's sale : if not preferred and first paid, whether must there be any, and what apportionment of the said money between them and the said judgment creditors.

The case was argued by *Bradford* and *Brown* for the plaintiff, and by *Ross* for the lien creditors ; but as the arguments of the former are stated and answered, and those of the latter supported by the opinion of the court, it is deemed unnecessary to repeat them.

Per Curiam. *Rush* President.

The lien acts of our state have given to those persons, who contribute materials or labor towards "erecting any house or building," a right to be paid, in preference to any other creditor, whose lien has originated *after* the commencement of the house or building. In the case now under consideration, it is conceded, that the houses were begun on the 24th and 25th of September, one thousand eight hundred and six, and that the judgments against the defendant, are all *subsequent* to those dates. The houses Nos. 2 and 3 were begun, before the first judgment was obtained, which was on the 9th of October, one thousand eight hundred and six, the very day on which *Evans* and *Warner*, delivered the first part of their lumber to the defendant. Upon the plainest principles of justice, the lien, in this case, must refer to the *commencement* of the building, and not to the *time* of delivering the materials, which there is every reason to believe, were contracted for, at, if not *before* the commencement of the buildings. This construction, so far as respects the *delivery* of the materials, is perfectly agreeable to the letter and spirit of the lien laws. Thus far, the case is exempt from difficulty, and the lien creditors are clearly entitled to recover.

On the part of the plaintiff however, it is contended, that the lien laws have appropriated nothing but the *house* or *building*, as a fund to pay the material-men and the workmen ; that the lot or ground is a distinct fund, liable to the judgment creditors at common law, and that some mode should be devised, such as directing an issue to ascertain their respective value, and apportion the money among the different creditors. This reasoning, however plausible it may appear, will be found, upon examination, to be impracticable and contrary to law.

It is obvious, that this special claim of the lien creditors must be determined on a sound construction of the lien acts ; and on established principles of law. There can be no question as to the view of the legislature, which certainly was, to give the lien creditors every possible benefit arising from the house or building, as a fund for the payment of their demands. The project of selling the house, without the lot, would in a great degree, if not entirely, destroy the fund provided by the legislature. The security and preference given to them, would be a shadow instead of a substance. The titles to real property would be infinitely perplexed by a proceeding of this kind. One person would own the house and another the lot. In case the *house* only were sold, the purchaser would have no right to a foot of the adjacent or surrounding ground, and the owner might build against his doors and windows. It is impossible to trace all the mischiefs resulting from this new fangled title. Upon general principles of law, we are also of opinion, that the lien creditors have a right to sell both house and lot. A grant of the profits of land is a grant of the land. A grant of a pool of water is a grant of the land, which it covers. 1 Inst. 5, 6. So a grant of a *house*, is a grant of the lot, and the curtilage.— Upon this principle, a lien on the house, in the present case, is a legislative grant of both house and lot to the grantee. When a man grants to another a lien or mortgage on his *house*, it is in law a lien or mortgage on the lot also.

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ments on record must take effect according to their dates. The lien creditors might have made their liens perpetual, by pursuing the directions of the act ; but, as they have neglected to do so, and have adopted the common law remedy, there is no reason why they should be preferred to other creditors, who have been more vigilant than themselves, and have obtained prior judgments.

The court direct, that the money in court be applied to the payment of the mortgages and judgments, according to their respective dates.

With respect to lien creditors having a right to sell both house and lot, there can be no reason to doubt it. Like every other creditor, he has a right to proceed to judgment and sale, unless the law forbids it, which it has not in the present case. The proviso in the 3d section of the supplement of one thousand eight hundred and eight, has indeed restricted the lien creditor, in his execution and sale, to the identical property on which his lien exists ; and this is the sole object of the proviso, which is confined also to the proceeding by *scire facias* against the owners of the house and lot. In consideration of the priority of payment granted to him, and that the property of the *defendants* may in such case be sold in their *absence*, it was deemed just to limit the right of sale to the specific house or building, he had, by his labor or materials, contributed to erect.

The lien law supposes, which is often the fact, that the house is built by a person who has no right to the ground, and that the owner of the lot is wholly unknown to the lien creditor. The 3d section has therefore authorised the lien creditor, to sue the debtor, (the contractor) his executors or administrators by personal suit or action ; or to proceed by *scire facias* against the *debtor and owner* of the building, or his heirs, executors or administrators. This remedy by *scire facias* supposes that the contractor and owner may *both* be absent or unknown to the mechanic ; and a mode is introduced to secure the lien creditors at all events, by fixing a copy of the writ on the door of the house or building.

On the supposition that the law has given the lien creditor a right to sell nothing but the building, look for a moment at the consequences. The owner of a lot, after building upon it a valuable brick house, finds himself unable to pay for it, and is indebted to no creditor, except the tradesmen and mechanics employed in erecting it. If the building alone is to be sold by the lien creditor, it will necessarily sell for a *trifle, without the lot* ; and the debtor has only to get some friend to purchase it for his use, and he will practice a complete fraud on all his creditors.

It is the opinion of the court, that the houses and lot are both equally subject to the claims of the lien creditors. We do therefore order, that they be first paid out of the proceeds of the sale, and the residue to go among the other creditors, according to the priority of their respective judgments.

CASES

IN THE

District Court,

FOR THE CITY AND COUNTY OF PHILADELPHIA,

DECEMBER TERM, 1812.

SHULTZ against HUNTER.

1812.

December 1.

THIS action, which was *in case*, was commenced by a summons issued at the suit of Charles Shultz against John Hunter, James Ronaldson and John Snyder. The sheriff returned "summoned." *Barnes* and *Browne*, appeared specially for Hunter; *Ewing* and *Rush*, in the same way, for Ronaldson; for Snyder there was no appearance. The declaration was for a malicious prosecution. On the twentieth of January, one thousand eight hundred and ten, there was a rule to plead, and shortly afterwards the pleas were entered in this manner:

"Def't Ronaldson, pleads *non cul* and issue".

"Def't John Hunter, pleads *non cul* and issue".

No plea was entered for Snyder. The verdict of the jury was in these words:—"We find for the plaintiff, five hundred dollars, to be paid by the defendants in the following proportions; by John Hunter four hundred dollars, by James Ronaldson fifty dollars, and by John Snyder fifty dollars, say, five hundred dollars, with costs of suit."

James Ronaldson paid into Court fifty dollars, together with all the costs.

costs of suit." The court entered judgment *de melioribus damnis*.

In a *joint* action of trespass against three defendants, no issue was joined as respected one defendant, the jury found the defendants *jointly* guilty, but severed the damages; the defendant with whom issue was not joined filed a paper stating, "that he had no intention of continuing the suit, that he had no wish for a new trial, and that he was ready to pay the costs and damages."—The court refused to arrest the judgment on the application of the other defendants.

In an action for a joint trespass, against two or more, if the jury find the defendants *jointly* guilty, they cannot assess several damages.

In an action for a joint trespass against three, the jury found a verdict in these words.

—"We find for the plaintiff, five hundred dollars, to be paid by the defendants in the following proportions; by *A* four hundred dollars, by *B* fifty dollars, and by *C* fifty dollars, say five hundred dollars with

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On behalf of Hunter, two rules were obtained; one, to shew cause why a new trial should not be granted, and the other in arrest of judgment.

The following reasons were filed.

For a new trial,

The damages are excessive.

In arrest of judgment,

First, The jury have found the defendants *jointly* guilty, on a *joint* charge, yet they have *severed* the damages; which by law they cannot do.

Secondly, As to Snyder, there was no appearance, or issue, joined, consequently no judgment can be entered against any of the defendants.

Snyder, after the rules had been obtained, filed a paper, stating, "that he had no intention of continuing the suit, "that he had no wish for a new trial, and that he was ready "to pay the costs and damages."

Browne and *Excising*, in support of the rule to shew cause why the judgment should not be arrested.

This is an action on the case, but, being for *damages* for a tort, it is governed by the same rules as an action of trespass. Against joint trespassers there can be but one satisfaction. (a) The reason of this is, because it is one common undertaking, in which all must, *necessarily, be guilty*. How then can the damages be severed? If they are all sued in one action, though they sever in pleas and issues, yet one jury must assess damages as to all. (b) In an action of assault and battery, proof was that one of the defendants committed the most violent assault, but lord Ellenborough said, that the damages could not be severed; but that the jury might give a verdict against both, for the greatest amount of damage. If there could be a severance of the damages, then there would be *seperate judgments* entered in one *joint action*, for a *joint* trespass; which cannot be. In trespass against several who join in pleading, if the jury find all jointly guilty, they cannot assess several damages. (c) Trespass against three defendants, and judgment by default, the plaintiff exe-

(a) Selwyn's N. P. 53.

(b) *ibid*.

(c) *ibid* in note 4 Esp. N. P. Cas. 185.

cuted writs of inquiry against them separately, which they contended to be irregular. 1848.

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Thirdly. As to Snyder, no appearance was entered, nor was any issue joined. As respects him therefore, there has been a *mistrial*. Trespass against two, and verdict for the defendants, and judgment was arrested, because no bail was entered for one of them; and it being a joint action and a joint verdict, it is irregular as to the whole. In an action of trespass against three, if one die, pending the writ, and judgment is given against the three, on a writ of error, the judgment shall be reversed, because it is entire; though the writ, by the death, abates only as to one. (a) So if judgment be arrested because one is an infant and appeared by attorney, it shall be reversed *in toto*. (b) So in an action against A. B. C. A as a *feme sole*, and all plead to issue as the *baron* of A with A. B. and C. may bring error, and assign for error, the coverture of A; and judgment shall be reversed as to all; for it is entire. (c) If one defendant only be charged with the whole of the damages and costs, this may be alleged for error by the defendant not charged; for this is an error in final judgment; it is the fault of the court. (d) So a person may assign, for error, want of jurisdiction, though he chose to resort to it; (e) And error may be assigned in the entry of a judgment, though the error is to the advantage of him who assigns it. (f) They also cited and relied on the case of Ennet against M'Donald* as in point.

Hopkinson and Sergeant, for the plaintiff.

If the jury had severed the damages in this case, it would have been nothing more than the plaintiff might do by his execution. But there has been no severance; the words "we find for the plaintiff five hundred dollars" is a complete verdict, and all the rest is *surplusage*, which the court will reject. (g) The court have power to mould a

(a) 2 Tidd's pract. 797.)

(b) 6 Term Rep. 199. *Mitchel against Milbank*. See also to the same point 6 Bac. abt. 597. 5 Bur. Rep. 2792. Bul. N. P. 20. 1 Str. Rep. 422. Cro. Eliz. 460. 2 Bac. abt. 273.

(c) Vin. abt. 464. Bail L. 6.

(d) 2 Bac. abt. 500 Error M. 1.

(e) *ibid.* 2 Cranch 126.

(f) *ibid.*

(g) 2 Bac. abt. 49. K. 4.

* Vide Appendix.

1812. verdict into form; (a) and they will reject what is idle and immaterial. (b)

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As to the second point, they said, that all actions of torts, are in their nature, *joint* and *several* throughout their stages; joint trespassers may be sued severally; but there can be but one recovery; and if sued jointly, execution may be levied on one alone, and he has no power to make his co-trespassers contribute. In actions of contract, it is totally different; there, if a party to the contract, be omitted it may be pleaded in abatement, and if no plea in abatement is put in and a recovery is had against one of several joint contractors, the others are bound to contribute. There is therefore no similitude between the case of *Ennet against McDonald*, which was contract, and this which is case, for a tort. What damage has Hunter sustained? If there had been a joint verdict, for the five hundred dollars, we could have entered a *verdictum prosequi* as to all but him: (c) then the distribution is favorable to him. Were there several verdicts, we might enter judgment for the largest sum, and remit the rest. Snyder, who alone had the right to make objections, waves that right. Second Cranch, 126 was read, to shew that a party may assign an error in his favor; the reason of that decision is, that *consent* could not give *jurisdiction*. We admit that Snyder has not been tried, but we deny that Hunter can take advantage of that circumstance.

PER CURIAM.

Hemphill, President,

At the trial, the counsel made defence generally, for the defendants. The jury found a verdict in the following words, viz. "we the undersigned jurors, in the above case, find for the plaintiffs damages five hundred dollars, to be paid by

(b) Hob. Rep. 53. *Foster against Jackson*. *ibid* 177. *ibid* 119.

(a) 1 Dall. Rep. 462. *Thompson against Musser*. 2 Bur. Rep. 689
Hawks against Crofton. Cro. Car. 130. *Inkersalls against Samms* *ibid* 219
Taylor against Willes. Co. Lit. 277. Sec. 366.

(c) 2 Tidd. Prae. 4, 5 & 6.

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“ the defendants, in the following proportions : from John Hunter four hundred dollars ; James Ronaldson fifty dollars ; John Snyder fifty dollars—say five hundred dollars with costs of suit.”

After the verdict, Ronaldson paid into court the fifty dollars found against him, and all the costs of suit.

Two rules have been obtained, one to shew cause why there should not be a new trial, and the other in arrest of judgment.

A new trial has been asked for, principally on account of excessiveness of damages ; but, consistently with the established principles on this subject, the court think that a new trial cannot be granted.*

The substance of the reasons in arrest of judgment is reducible to two heads :

First. It is said that the jury have found the defendants, jointly, guilty of a joint charge, and have afterwards severed the damages, which by law they cannot do.

Secondly. As to John Snyder, there was no appearance or issue joined, consequently no judgment can be entered against any of the defendants.

In respect to the first point, it seemed to be admitted on the argument, that the law relating to actions of trespass, was applicable, and ought to govern our present decision.—This appears to be correct, for the reason on which the law is founded, operates with equal propriety in each action ; and we find that it has been so considered in actions on the case for malicious prosecutions. (a.) In actions of trespass, the law is well settled, that where the trespass is jointly charged, and the jury find the defendants jointly guilty, they cannot afterwards assess several damages, (b.)

If the jury were allowed to sever the damages, separate judgments must be entered for the respective sums found ; and, in that case, each wrong doer would not be responsible for the acts of his companions, which is contrary to the rule of law on the subject. On the other hand, the plaintiff is only entitled to one satisfaction, and the damages found being generally

* See Judge Brackenridge's enquiry into the origin of new trials, appendix.

(a) Buller's N. P. 15.

(b) 5 Bur. 2790.

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exemplary, the rule, in estimating the damages, ought to be, to give a verdict against all, for as much as the jury think the most culpable ought to pay; and not for the aggregate, of which each ought to pay according to the different degrees of guilt. Upon the whole, the court, after much reflection, have deemed it most correct to consider the verdict as one assessing several damages. To construe it as a general verdict for five hundred dollars, would be bearing harder against the actual intention of the jury than the law will warrant.—The judgment, however, need not be overruled for this reason, as it may be entered *de melioribus damnis*.

In giving a decision upon the second head, it will be useful to advert to some of the properties belonging to these sort of actions.

In trespass, the cause of action is joint and several; the plaintiff may sue all, or a less number jointly, or each separately; and some may be found guilty and others acquitted; there may be several recoveries, but only one satisfaction; (c) and, where the action is against many, the plaintiff can elect

(c) In the case of Duane against Mierkin, which was an action of trespass, assault and battery, a verdict was obtained for six hundred dollars damages; there had been a plea of "former recovery for the same trespass, by the same plaintiff, against Dunlap; a new trial was granted by Yates and Smith, justices, the chief justice, Tilghman, not sitting, having been concerned in the cause, while at the bar. BRACKENRIDE, justice, who dissented, gave the following opinion. REPORTER.

Duane against Mierkin; trespass, assault and battery; plea, recovery for the same trespass in an action by the same plaintiff against Dunlap: verdict six hundred dollars: motion for a new trial.

The facts of the case were, that a trespass of assault and battery on the plaintiff, had been committed by a number of persons, of which Dunlap was one, and a verdict had passed against him for three hundred dollars, and judgment and execution followed; and now, a second action brought to the same term, and for an assault and battery, upon the same occasion, or in the course of the same affray, against Mierkin, in which this verdict had been given. The question is, whether the last verdict is against evidence; for that can be the only question, nothing being said with regard to the *quantum of the damages*. It is the plea of the defendant, that satisfaction has been had before, and no damages ought to be recovered. I have said, that the only question can be, whether the verdict in the case of Mierkin is against evidence, it being a mere matter of fact submitted to the jury, whether the trespass was the same in both cases. But the inference of fact from the evidence, and the conclusion of law from the fact, are both included in the general verdict; and if the jury have erred in either of these, I would call it a verdict against evidence; nevertheless, it can be but in the conclusion of the law from the fact in this case, that there can be any difficulty. For, that the assaults and batteries committed by the several defendants, were on the same occasion, and in the course of the same outrage, will be conceded; or, as I take it, will not be disputed; nor needed it be; for this inference of the fact from the evidence, is incontrovertible. But being on the same occasion, and in the course of the same outrage, must it follow as a legal conclusion that it was the same trespass? I will admit that, in the case of several defendants, where the act of one is only that of being present, aiding and abetting, it becomes a trespass, only

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to levy his execution on any one of the defendants; and the defendant levied upon, cannot compel the others to make contribution; and also, where the action is against several, and on issue joined, some are found guilty of the joint charge, and damages are found, and others come in and confess the action, or suffer judgment to go by default, they are liable for the damages assessed by the jury, who tried the issues.— (11 Co. 5, 6.) And although a writ of inquiry is awarded, none need issue. In the case before us, the plaintiff had a right to declare against John Snyder, and take judgment by default; and this might have been done before or after the trial of the issues, joined by the other defendants. Thus, it is readily perceived, how very different these kind of actions are from actions upon joint contracts.

from the act, which is aided and abetted, and is in law the same act. The aiding and abetting is *constructively* a trespass; and it is only by being considered the same trespass, that it can be a trespass at all. For if it is constructively a trespass, it is by reason of being construed the same act. A recovery, therefore, in one case, must be a bar to a recovery in another. But where there are *substantial and independent acts* of several defendants, in the course of the same outrage, must they be considered the same act?—Doubtless they may be considered joint, and prosecuted in that light, and the law is, that in that case, the damages cannot be severed in the same action. "For the trespass which the plaintiff has made joint, cannot be severed by the jury, if the jury find the trespass to be done all at one and the same time. But if the jury find guilty, one at one time, and the other at another time; then several damages may be assessed." (Bul. N. P. Cites, 11, Coke 8.) But if the plaintiff does not elect to consider the trespass joint, but severs in his action, where is the law or the reason of it, that hinders the recovery of several damages for trespasses, even at the same time; that is, supposing the several trespasses even at *the same point of time*. I say, that when the plaintiff does not elect to consider them joint, and the battery consists of substantial and independent acts, he may sever in his action, and the jury in the damages. If blows are given by several persons, at the same time, say, one on the occiput, another on the sinuiput of the head, does it follow that he must consider these as the same trespass?

But the nicety and difficulty of the case is, that if evidence of both blows have been given in the action against one, is it not a presumption of the law, that both have been in the view of the jury in estimating the damages, and that the recovery ought to be considered as for both? It is and ought to be a presumption of law, for it is the presumption of reason and common sense; but that presumption may be repelled: how? Not probably by the testimony of the jury, or jurors, as that might lead to inconvenience; but I see no reason why it may not be by the *verdict of the jury*. That will be before the jury in the second action; or action against a defendant in a subsequent case; for it must be given in evidence to support the *plea in bar*; and it will at the same time afford evidence of the proportion of the damages to a portion or the whole of the trespass. It cannot well be but that in the course of the evidence, the trespass committed by one, at the same time with that of another, both will be in evidence: nay, it may be proper that they should be in evidence, and both spoken of as circumstances of aggravation to each other; as, for instance, in an action against A, for a stroke on the occiput, it may be shown, and enlarged upon as a circumstance of aggravation, that it was while the plaintiff was assaulted and beaten by B, on the sinuiput, that A came up behind his back and struck him on the head. This may savour of refinement; but it is necessary to analyze a principle that it may be understood.

It may be, that an advocate may enlarge upon the concomitant trespass, and press it into the account to a greater extent, than as a circumstance under which the battery was committed, which makes the ground of the action; and this may have been actually the case in that of Duane against Dunlap; but it does not necessarily follow, that the jury took it into view to that extent; and comparing the damages with the evidence in that

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Several cases have been read, to prove that the judgment ought to be arrested; but it is unnecessary to say any thing as to their general application, the present case being quite distinguished from them, by an agreement signed by the party who omitted to join issue. Here, John Snyder, after the motions in arrest of judgment and for a new trial, has signed a paper, which is filed on record, stating, that he has no intention of continuing the suit; that he has no wish for a new trial; and that he is ready to pay the costs and damages. After this, the court would look for an express decision, to shew that Hunter had such a distinct interest in this particular, as to be able, alone, to take advantage of it. Snyder has waved taking any advantage of the mistrial, which happened only as

case, it must be manifest, that they did not; and where the court are called upon to take the place of the jury, and to judge of the inference of fact, and the legal conclusion embraced by the general verdict, they are justified in looking at the damages and comparing them with the evidence in both cases. I sat on the trial of Duane against Dunlap, and there being actions against several defendants, I had no idea that the jury were to take into view the whole trespass on that occasion; nor did the charge of the deciding judge, as I understood it, look to that extent. From the damages given, I could not think that the jury had this in view. So that unless a general inconvenience would follow, I do not see why the jury, under the evidence in this action, are not at liberty to go farther against another defendant. For, unless a general inconvenience would follow, the particular hardships ought not to be incurred of one person being made liable for a trespass committed by several; and the whole damages be made to fall upon, perhaps, the least culpable. The person aiding and abetting would escape, unless a *constructive* trespass was admitted, and accessories considered principals; and multiplicity of suits would be inevitable, unless the plaintiff could prosecute a joint action; and where the action is joint, the law is settled, and it is to be presumed, on good reason, probably because the costs are joint, that the damages cannot be severed; but where several actions are brought, I find no decision in the way of a recovery against each in damages *pro rata* of the trespass. The latest authority on this point is 4th Esp. N. P. 188. "This was an action of assault against two. On the part of one, the assault was proved to have been committed with more violence, and attended with more circumstances of aggravation, than on that of the other. Lord Ellenborough, in summing up the evidence to the jury, told them they could not sever the damages, and give more against one defendant than against the other; but that they should therefore take it as their rule in estimating the damages, to give their verdict against both, to the amount to which they thought the most culpable of the defendants ought to pay." This is the doctrine of the preceding cases; that of H. Co. particularly, which was the case of a joint action against several, and it is to be remarked that except as to one, the trespass in that case would seem to be *constructive*.—For though, says the reporter, they were parties, yet that of one was the most malicious and cruel, and *it was his hand that gave the wounds*. But in that case, as we have already said, the law is laid down that even in a joint action against several, where the writ and declaration are joint, that the jury may find one of the several defendants guilty at one time and one at another, which proves that it is left to the jury to say, whether the trespass is the same, of which each has been guilty: and where the jury in the case before us, where the action is not joint but severed, and where the pleadings have gone directly to the point, and the issue has been, whether the trespass has been the same with that for which a recovery has been had in another case, shall the court undertake to say, that the conclusion drawn was against evidence; that it must result as a legal consequence, that as the trespass has been committed by the same party, and on the same occasion, they must be considered to be the same. I cannot do it, where it would be manifestly against the truth and justice of the case, and where, in fact, I cannot but know, that the verdict given in the former case of Duane against Dunlap, was not meant to comprehend more than the damages proportioned to the trespass by the particular defendant.

to himself. Were the court to arrest the judgment, under the circumstances of this case, they would stand unsupported by any authority, and the reason and justice of the case, are clearly on the other side. Besides, it is an invariable rule, with regard to arrest of judgment upon matter of law, that whatever is alleged in arrest of judgment, must be such matter, as would, upon demurrer, have been sufficient to overturn the action or plea; and it is inconceivable to the court, how Hunter could have demurred successfully, because Snyder had not appeared and plead.

1812.

 SHULTZ
 against
 HUNTER.

As to Snyder, the court will consider of the propriety of entering judgment against him, by virtue of his agreement, if the plaintiff chooses to bring that question distinctly before

If even on the trial, it had been laid down in the charge to the jury, that the trespass of the assailants in this case must be considered single, and that the whole damages must be assessed against the one, in whose case the jury were sworn, I should have thought the charge erroneous in point of law; but where no such charge was given; but, from any thing that was hinted, to the contrary, the jury were left to consider the trespass of a particular defendant, to say now that the jury have erred in not considering the whole as accumulating upon one, must be still more evidently so. I take notice that even in an action for a malicious prosecution, against two, it has been ruled differently by different judges, as to severing the damages, even in a joint action. [Str. 79 and 910.] And yet in its nature, a malicious prosecution, though consisting of different acts, by different persons, can be brought to bear upon the person injured only at one time in the legal consequence, and there may be less reason, why the damages should not be severed; nevertheless, I would incline with chief justice King, to sever the damages, and the justice of it struck me much in a late case, Lion against Fox and others. But even in the case of a malicious prosecution, where the actions are severed, I know of no decision that precludes a several recovery. On indictments for misdemeanors, fines are laid proportionate to the aggravation of the acts of individuals, and why not damages recoverable in the same proportion, at the suit of the party? Doubtless, there can be but one satisfaction, and a recovery against one, may be supposed to be for the whole injury. But why shall not that be matter of fact, to be considered by the jury, from a comparison of the circumstances of the case, with what has been recovered? Equality is equity, and I am for letting every tub rest upon its own bottom, and saddling no man with more than his own transgressions; and as far as practicable, I would restrain responsibility to the act of every man for himself.—The establishing a principle of law, unfavorable to this, I do not like; that a plaintiff shall not take his damages, or a jury be allowed to give them according to the injury sustained from different persons, though happening in the same affray; yet this is the consequence of hindering the jury, where the action is joint, to give several damages; or that if they do, the plaintiff shall take out execution against one only; or that if he brings several actions, a recovery against one shall be considered as a bar to the others. In trespasses, damages are compensatory, and exemplary. Where the damages, in the nature of the case, ought to be compensatory only, as in case of a mistake of right, or where it is involuntary, even where several are concerned, a compensation from one, ought to serve for all; but as to what is *exemplary* that must depend upon the aggravation of the particular conduct of individuals. This is laid down, in the case of a libel, by lord Eldon. [2 Bos. and Pul. 71.] “The person, who disperses the libel, as a mere agent, and the principal himself, ought to suffer in very different degrees; because the former is comparatively innocent.” But if both are sued together, and the damages cannot be severed; or, if recovery against one is pleadable in bar, to an action by the other, this difference in the grade of the offences cannot be taken into view. The principle, which governs this question, must be drawn from the common law, which is a system of reason; and if the application of the principle is tested by reason, on the ground of general convenience, public policy, or individual justice, I see nothing against it.

1812 us. Judgment, however, can be taken against him by default, if there has been no legal appearance.

SHULTZ
against
HUNTER.

At present, the court direct judgment to be entered against Hunter and Ronaldson for four hundred dollars, with costs of suit, &c.

CASES

IN THE

District Court

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

FRANKFORD v. PHILLER.

1813.
5 January.

A Capias was issued to September Term 1812, to which the Sheriff returned *Cepi Corpus* and Bail Bond.

The 15th of September 1812, the plaintiff entered a rule of reference under the arbitration act.

The 10th of October 1812, the report of the arbitrators was filed in the office.

The Bail Bond was sued to December 1812.

On motion a rule was granted to shew cause why the proceedings on the Bail Bond suit should not be staid, on the ground that the special bail had been waved by the rule of reference.

Meredith, in support of the rule, contended, that the appearance had been accepted by the rule for arbitration. In England, there are many acts of a plaintiff, which are considered as a waiver of bail, and entering into an arbitration is among the number. (a)

(a) Tidd's Prac. Lon. Ed. 993.

Entering a rule for arbitration, by a plaintiff, in a cause, is no waiver of the Special Bail.

1818.

FRANKFORD
against
PHILLER.

The form of the recognizance, said he, is a strong, if not conclusive, argument in favor of the proposition; the terms are *prospective*, and not *retrospective*; “that if the defendant *shall be condemned, &c.*” in this case the defendant has already been condemned.

McKean Contra, argued, that the special bail was not waved: the question, he contended, was to be decided upon the arbitration act of Pennsylvania, and the decisions of our Courts; and not upon the practice of the Courts at Westminster. It had been held, that the act authorized a rule of reference to be entered immediately upon the writ being issued, the arrest, the execution of the Bail Bond and the perfecting of bail above were acts that naturally succeeded. It was true, that it represented a course that was novel in judicial proceedings and which bore an apparent contradiction to the terms of the recognizance, but the answer to this objection was, *ita lex scripta est*. A contrary decision would put it in the power of a defendant to avoid an arbitration until after the time limited by the act for entering the rule.

Per CURIAM.

† HEMPHILL, *President*.

The Court are of opinion, that the proceedings in this case do not amount to an acceptance of the defendants appearance in Court, or a waiver of Special Bail. Proceedings under the arbitration law of 1810 may be carried on without any appearance in Court. The objection made on account of the form of the recognizance of special bail, could have been urged with equal propriety if the rule of reference had been taken out by the defendant, and report made in favour of the plaintiff, yet, in such a case, it could not be pretended, with any degree of fairness or reason, that the necessity of putting in special bail would thereby be affected.

Again, if it is incumbent on the plaintiff to compel special bail to be entered before he can take a rule of reference, he would often be deprived of the opportunity of taking out a rule

of reference at all, as it must be done thirty days previous to the third term, beyond which period the proceedings on the Bail Bond suit might be delayed, and afterwards stayed, on the payment of costs, entering special Bail, &c, which may be done before the plaintiff has lost a trial term.

1813.

FRANKFORD
against
PHILLER.

It is further to be observed, that references, under this Act, are compulsory ; and, as the defendant is at liberty to take out a rule of reference at any time after the action is entered on the Docket, it is but reasonable, that the advantage should be mutual, and without prejudice.

Let the rule be discharged.

Rule discharged.

CASHEE v. WISNER.

In this case a Capias was issued on the morning of the first day of the Term, and the defendant was arrested on the same day, after the rising of the Court.

A rule was obtained to shew cause why the writ should not be set aside.

The Court said that it had been the uniform practice to sue out writs of Capias on the morning of the first day of the Term, and it was immaterial whether the defendant was arrested before or after the Court had risen, there being no fraction of a day. (a)

The Court refused to set aside a writ which was issued the first day of a Term returnable to the subsequent Term upon which the defendant had been arrested on the same day after the Court had risen.

The rule was discharged.

(a) Wils. Rep. 372. Beal against Langstoff. 2 Bur. Rep. 812. Maud against Barnard. Prac. Reg. 352. Tidd's Prac. 148.

1813
January 8

THACKARA v. CURREN.

In an action of slander, where the words were not actionable in themselves, but were laid as having been spoken of a man's *trade* or *calling*, the Court refused to allow the declaration to be amended after the jury were sworn, by altering the *trade* laid in the declaration.

Action of Slander.

The declaration stated the Plaintiff to be a *Mason and Bricklayer* and one of the measurers in *that* business. The first Count charged the defendant with saying of the plaintiff that he was a liar, a scoundrel and a cheat; that all the measurers (meaning measurers of masons and bricklayer's work) were a set of swindlers and the plaintiff was a rogue. The second count charged the same words to have been said by the defendant to the plaintiff. By reason whereof the plaintiff was injured in his trade, &c. Damages, \$1000.

After the jury were sworn Hopkinson, for the plaintiff, moved, on the authority of the Act of Assembly, to amend the declaration, by striking out the words "mason and bricklayer," wherever they occurred, and inserting in lieu thereof "plasterer."

Browne, contra, contended that the Act of Assembly authorised those amendments only which were matters of form, and the one proposed was of a substantial nature; the words laid were not actionable in themselves, but were made so when spoken of the plaintiff's trade and calling which the counsel wanted now to alter.

Hopkinson in reply said, that though the words were not actionable in themselves, they were so when applied to *any* trade or calling; the altering, therefore, of the particular trade was mere matter of form.

But BY THE COURT,
HEMPHILL, *President*.

We have always confined the operation of this statute to very narrow limits; in one case we refused to allow a declaration to be amended by striking out the word endorser and inserting endorsee. We cannot allow the amendment in this case.

Motion refused.

CASE

IN THE

Court of Quarter Sessions

OF

LANCASTER COUNTY.

NOVEMBER SESSIONS 1811.

COMMONWEALTH against TEXTER.

1811.

The defendant, Daniel Texter, was indicted on five bills, for stealing horses from five different persons.

Pleas "*not Guilty.*"

The evidence was conclusive as to the defendant being found with the whole of the horses in the County of Berks, but through inadvertence there was no proof except upon one of the indictments, of the horses having been taken in the County of Lancaster. The examination being finished the Attorney General was called upon to declare whether the evidence was closed, that the prisoner's counsel might address the Jury, which was affirmatively answered.

Hopkins then addressed the Jury on behalf of the prisoner and pointed out the want of jurisdiction both in Court and Jury, to hear or convict the defendant on four of the charges.: That the evidence fully established another jurisdiction competent to hear and determine the larcenies charged. That if the Jury and Court here convicted and sentenced him on this evidence, he would be liable tomorrow to be indicted, tried, convicted and sentenced a second time, for the same offences, in Berks County, without the possibility of

On an indictment for larceny.

After the deputy Attorney General had closed the evidence and the defendant's counsel had summed up, the Court allowed further evidence to be given on behalf of the Commonwealth.

1812. **COMMON-WEALTH against TEXTER.** prevention. That the Jury were therefore called upon as humane, honest, and honorable men, to acquit the defendant, not only on the ground of the total defect of proof to convict him on four of the charges, but also on the ground of the inhumanity and unconstitutionality of making it possible to subject this unfortunate man to a second jeopardy for the same offence.

After Hopkins had concluded the prisoner's defence JENKINS, Deputy Attorney General, proposed to call the witnesses again, to prove that the horses were all stolen in the County of Lancaster, to obviate this technical difficulty (as he called it) in the way of most pregnant proof.

This attempt Hopkins most strenuously opposed as novel, highly dangerous, and alarming, and contrary to the settled practice and law in criminal cases.

THE COURT, FRANKLIN, *President*,

After argument, declared that they could not be spectators of the Justice of the Country being evaded by an act of mere inattention on the part of the witnesses, or the prosecution, and they would therefore allow the witnesses to be re-examined. This was accordingly done, and the defect in the testimony conclusively supplied, on which the defendant was convicted upon all the charges and sentenced.*

* See 7 Johns 32, 306. 2 Hale, 296.

CASE
IN THE
Court of Quarter Sessions
OF
YORK COUNTY,

January Sessions, 1812.

COMMONWEALTH against ECKERT.

1812.

THE Defendant was indicted, for a misdemeanor, in cutting and deadening, a black walnut-tree, on the common, or public ground, adjoining the village of Hanover, in this county, the property of which was vested in certain trustees, for the use of the inhabitants of said town, by deed, from the original owner of the land.

An indictment will lie for deadening and destroying a tree standing on public ground.

The indictment was drawn as follows :

“ January Sessions, MDCCCXII.

“ York County, ss.

*“ The Grand Inquest for the County of York, upon their
“ oaths and affirmations do present, that Peter Eckert, late
“ of the county aforesaid, yeoman, on the twenty-sixth day of
“ October, in the year of our Lord one thousand eight hundred and eleven, with force and arms, &c. at the county
“ aforesaid, unlawfully and maliciously did deaden, and destroy, one black walnut-tree, standing on public ground,
“ adjoining the town of Hanover, in the county aforesaid,
“ then and there growing for public use, shade, and ornament, and particularly for the use and benefit of the inha-*

1812.

COMMON-
WEALTH
against
ECKERT.

“ bitants, of the town of Hanover aforesaid, to the evil ex-
“ ample of all others in the like case offending, and against
“ the peace, and dignity of the Commonwealth of Pennsylv-
“ vania.”

Kelly and Cassat, for the Commonwealth, offered a witness, who was an inhabitant of the town of Hanover, to prove that the tree stood on the public ground, which was vested in certain trustees for the use of *all* the inhabitants of said town.

Bowie for the defendant, objected to the witness, on the ground of his interest, being an inhabitant of the town of Hanover.

The Court admitted the testimony after the deed was read.

The witness proved that this tree was useful as a shade tree, on public occasions, and that the Defendant cut and decadened it.

For the Commonwealth, it was contended that it was a maxim in the law, that there was no injury without a remedy; (a) and this being a public loss and injury, nothing but an indictment would lie, it is the malicious intent that constitutes the crime.

Every act of a public evil example, and against good morals, is indictable at common law. (b)

Bowie, for the defendant. It is a rule in morality, as well as in charity, to apply an innocent motive, rather than a malicious one, to have actuated the defendant.

A crime or misdemeanor indictable, must be a violation of some known public law. (c)

Act of assembly against taking off or breaking knock-

(a) 3 Bac. Ab. 92. (b) 1 Dall. Rep. 335.

(c) 4 Bl. Com. 5. 1 Haw. P. C. 366, 7. sect. 1.

ers on doors, spouts, &c. breaking down or destroying signs, &c. (d)

1812.

These were offences, not indictable at common law, and therefore the necessity of the statute.

COMMON-
WEALTH
against
ECKERT.

A number of cases of a private nature are not indictable. (e)

Such as breaking closes, &c. (f) Cases that apply to individuals, or to a parish, are not indictable, and there is no difference in this case, from that of six, eight, or ten tenants in common of a property, and one of the number cutting a tree, an indictment could not be supported against him that did the act.

PER CURIAM.

Franklin, President, to the jury.

The defendant is charged with a misdemeanor, in cutting and deadening a black walnut tree, standing on public ground, adjoining the town of Hanover, which ground appears to be vested by deed, in certain trustees, for the use and benefit of all the inhabitants of said town. This tree was kept and appropriated, by the people of that place, for shade and ornament.

The doctrine on subjects of this kind is well laid down by the late chief justice M'Kean. (g) Whatever amounts to a public wrong, as killing a horse, poisoning chickens, and the like, is the subject of an indictment for a misdemeanor.

Malice forms the guilt of the indictment. Any evil design, proceeding from a depraved or wicked heart.

If you should consider the tree was useful, for public convenience, ornament, and shade (which we think has been fully proved), you may convict the defendant: if not, acquit him.

Verdict Guilty.

(d) Read Dig. 7. act of 1772.

(e) 2 Haw. P. C. 301.

(f) 3 Burr. 1698.

(g) 1 Dall. Rep. 335.

1812.

COMMON-
WEALTH
against
ECKERT.

On the 9th of January, 1812, *Bowie*, the defendant's counsel, filed the following reasons for granting a new trial :

1st. Because it was not proved, that the tree, alleged to be deadened, was on *public ground*, or devoted to *public use*.

2d. Because it was not proved, that the alledged deadening of the tree was done *maliciously*.

3d. Because the verdict was contrary to law and evidence.

Reason in arrest of judgment.

Because the allegations in the indictment, are insufficient to support a criminal charge.

The Court, on argument, overruled the motion for a new trial, and that in arrest of judgment, and on the 6th January, 1813, sentenced the defendant to pay a fine of ten dollars, and the costs of prosecution.

CASES

IN THE

Mayor's Court

OF THE

CITY OF PHILADELPHIA.

Present—The Recorder Reed and Aldermen Inskeep, Keppeler and Douglass.

The OVERSEERS OF THE POOR of the Townships of Oxford and Lower Dublin Appellants against The GUARDIANS OF THE POOR of the City of Philadelphia, &c. &c. Appellees. 1811.

A PPEAL from the order of Removal made by Messrs. Aldermen Shoemaker and Baker, 2d December, 1812, removing Catherine Delany from the City of Philadelphia to the townships of Oxford and Lower Dublin.

The order of removal was dated the 2d of December, 1812.

The pauper was delivered to the matron of the poor house of Oxford and Dublin, &c. on the 8th of December.

The notice of the appeal to the court of Quarter Sessions of the County was dated the 7th January, 1813. The appeal was filed the 2d March, that being the next sessions of that court, and on the 22d it was dismissed, because the court had no jurisdiction. The same day an appeal was filed in the Mayor's Court.

An appeal from an order of removal of a pauper was, by inadvertence, made to the Quarter Sessions, instead of to the Mayor's Court; the appeal being dismissed by the Quarter Sessions, was the same day lodged in the Mayor's Court; but the Mayor's Court also dismissed the appeal, because it was

not lodged to the next session after the removal.

1812.

The Overseers
of the Poor of
the townships
of Oxford and
Lower Dublin,
Appellants,
against
The Guardians
of the Poor of
the City of
Philadelphia,
&c. Appellees.

Ewing, on behalf of the appellees, moved to dismiss the appeal, because it was not made to the next sessions, &c.

The 21 sect. of the Poor Law, (a) states, "That if any person shall think him, her, or themselves aggrieved, by any order of removal made by any of the said Aldermen or Justices, such person or persons may appeal to the next Mayor's Court for the said city, or to the next court of Quarter Sessions of the peace for the said county from whence such poor persons shall be removed; which said court shall determine the same, &c."

The COURT.

REED, Recorder, gave the following opinion.

There can be no doubt but that the appeal may be made to the next Sessions after the removal of the pauper; the party appealing is not confined to the Sessions after the date of the order; for it is by the removal that the party is aggrieved. If it were otherwise, an appeal might in all cases be prevented, by withholding the order and removal until after the first session. The words of the act of Assembly, the reason of the case, and all the authorities support this construction. On the present occasion, however, this circumstance is altogether immaterial, because there is no Session intervening between the date of the order and the removal of the pauper.

It is not necessary that the appeal should be to the first day of the Session. There is no rule or practice of the court which requires that it should be either to the first or any subsequent day of the Session, and why the period of the discharge of the grand jury should be fixed upon as the limit I know not, nor can I discover what possible connection there is between the grand jury and the hearing on an appeal. The act of Assembly provides that the party aggrieved may appeal to the next Session. A Session or Term of a Court is always

(a) Purdon 450. 4 Smith ed. Laws Penns. 50.

considered as one day, and I should much doubt whether the court could, by rule, prevent an appeal at any time during the Session. An appeal may be received even at an adjourned Session; "but if no Sessions are held pursuant to the adjournment, the original Sessions are completed, and the justices have no jurisdiction to entertain an appeal at the ensuing Session." There can be no kind of doubt but that this appeal was entered in proper time in the court of Quarter Sessions. The order of removal was executed during the sitting of the *December* session, and the appeal was entered to *March*, which is the next session; but as that court had no jurisdiction (for they have so determined) I do not know how we can take notice of any thing that passed there. There was no laches in lodging the appeal, but it was to a court which had no authority to sustain it, and we must therefore consider it precisely as if no appeal whatever had been made.

1812.

The Overseers
of the Poor of
the townships
of Oxford and
Lower Dublin,
Appellees,
against
The Guardians
of the Poor of
the city of Phi-
ladelphia, &c.
Appellees.

The words of the act of Assembly are very strong, that the appeal must be to the *next* session; but, to use the words of all the authorities, that must be the *next possible* sessions, that is, the session to which the party can by possibility appeal after he is aggrieved.

What is then the present case?

An order of removal is made on the 2d of December, and remains unappealed from, in the only court in which it could be revised, until the 22d of March; in the mean time the December sessions, which is the next sessions of the proper court, passes by; can it be received at this time? The reason assigned for the delay is the mistake of counsel, very innocently and naturally perhaps made, because it may be doubtful to which of the two courts the appeal ought to have been made, or whether both had not a jurisdiction; but as the court of Quarter Sessions have determined that question, we must consider it as no longer doubtful. All the authorities speak in strong language of the *next possible* sessions, and I find no case in which the appeal has been received at a subsequent term, when it could by possibility have been made before. Most of the cases referred to in the books are, where an order of removal has been made some time, but only exe-

1812.

**The Overseers
of the Poor of
the townships
of Oxford and
Lower Dublin,
Appellants,
against
The Guardians
of the Poor of
the city of Phi-
ladelphia, &c.
Appellees.**

cuted a very short time before the sessions, so that there was no possibility of appealing to those sessions. As respects time, there certainly was no difficulty in this case. The order was made 2d December, and the court did not meet until the 19th day of the same month, and the parties live within ten miles of each other, and no accidental or natural causes prevented, such as those mentioned by Mr. Ross, who stated the practice in Bucks county, where the court, on one occasion, received an appeal at the second session, because a quorum of the judges did not attend; and on another when, by the rising of the waters of the Neshaminy, the party aggrieved could not reach the court in time. The mistake in this case, although made by the counsel, must be considered as the act of the party, from the consequences of which *we are sorry we cannot relieve him*. We therefore reluctantly dismiss the appeal. Suppose, however improbable it may be, that this appeal had been made to the Supreme Court, by error of the counsel, in that case there would have been no laches in the party. Would that be a sufficient excuse; would it ever have been offered as one? How can we distinguish?

Let the appeal be dismissed.

Appeal dismissed.

CASES

IN THE

District Court

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

MARCH TERM 1813.

REYNOLDS *qui tam* against SMITH.

1813:
12 Janury.

By an Act of Assembly of Pennsylvania, passed the 24th of December, 1774, it is recited that, whereas the exportation of shad and herring to foreign markets was likely to become a considerable branch of the trade of the (then) Province, that it was therefore necessary that they be packed and salted in sound and merchantable casks, and undergo the inspection of some judicious person, before they were suffered to be exported. It was therefore enacted, that shad and herring, designed for exportation, should be packed, secured, inspected and branded in the manner therein particularly set forth.

In an action for a Statute penalty by an informer, the general rule is that the fact must be alleged to be done against the form of the Statute; but if such circumstances are stated as bring the case within the Statute it will be sufficient.

The 6th section of the Act contains the following clause:
“ If any person shall ship off any cask or casks of shad or
“ herring, not branded with the provincial brand-mark as
“ aforesaid, every person, so offending, shall forfeit and pay
“ the sum of ten shillings for every cask so shipped.

The 11th section declares that the fines, forfeitures and penalties, in and by the Act set and appointed, shall be paid one half to the informer and the other half to the overseers of the poor, of the city, township or place where the offence shall be committed.

1813.

REYNOLDS
against
SMITH.

This suit was brought by Benjamin Reynolds *qui tam v.* William J. Smith, for \$112, for shipping off and exporting 84 casks of herrings, not branded with the State brand mark ; the declaration was in the words following.

“ William J. Smith, the younger, late of the County aforesaid, was summoned to answer unto Benjamin Reynolds, who sues as well for himself as for the guardians of the poor of the city of Philadelphia, the district of Southwark and township of the Northern Liberties, for the use and benefit of the poor of the said city and districts annexed thereto, in a plea, that he render unto them the sum of one hundred and twelve dollars, which to them he owes and unjustly detains, &c. And whereupon, the said Benjamin Reynolds, by Peter A. Browne and John Sergeant, his attornies, complains that the said William, on the first day of June, Anno Domini one thousand eight hundred and nine, at the County aforesaid, did ship off and export from this Commonwealth, eighty four casks of herrings, which had not been submitted to the view or examination of the officer or his deputy, by law for that purpose appointed, nor branded with the State brand mark, whereby and by force of the Acts of Assembly of Pennsylvania, in such cases made and provided, the said William hath forfeited the sum of forty two pounds, equal to one hundred and twelve dollars, to wit: Ten shillings for every cask, one half thereof to the said Benjamin, the informer and person who sues for the same, and the other half to the overseers of the poor of the city, township, or place, where the offence was committed, to wit: The guardians of the poor of the city of Philadelphia, the township of the Northern Liberties, and the district of Southwark, whereby an action hath accrued to the said Benjamin, who sues as well for himself, as for the said guardians of the poor, of the city of Philadelphia, the township of the Northern Liberties and the district of Southwark, to demand and have of the said William the said forty two pounds, and therefor he brings suit, &c.

To this declaration the defendant pleaded *nil debit*.

The Jury gave a verdict for the plaintiff for the sum laid in the declaration.

The defendant obtained a rule to shew cause why the judgment should not be arrested on the following grounds :

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First. That the Act of Assembly is not recited in the declaration.

Secondly. That the declaration does not conclude "against the form of the Act of Assembly," or allege that the offence was committed against any Act of Assembly.

Thirdly. That no breach is assigned in the declaration.

Fourthly. That so far as the reference is made, it is stated to be against the *Acts* of Assembly, whereas there is but one Act.

It was argued by M'Kean for the rule, and Browne and Sergeant against it.

PER CURIAM.

Hemphill, President.

This is a rule to show cause why the judgment should not be arrested. The reasons are as follows.

First. That the Act of Assembly is not recited in the declaration.

Secondly. The declaration does not conclude "against the form of the Act of Assembly," or allege that the offence was committed against any Act of Assembly.

Thirdly. No breach is assigned in the declaration.

Fourthly. So far as the reference is made, it is stated to be against the *Acts* of Assembly, whereas there is but *one* Act.

The fourth exception is not supported in point of fact. The Act of the twenty fourth of December, one thousand seven hundred and seventy four, inflicts a penalty of ten shillings per cask, each containing thirty one and an half gallons ; but the Act of the fifth of March, one thousand seven hundred and eighty seven, alters the size of the cask to twenty eight gallons ; of course the penalty given by the first act is forfeited by the operation of the Act of 1787, for the shipping off of a less quantity than that mentioned in the act of one

1813. thousand seven hundred and seventy four. The action is founded on both acts, and could not be sustained on either, separately.

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The other exceptions being very much connected with each other may be considered under one general view of the subject.

In an action for a statute penalty by an informer, it appears, from the authorities, that the general rule is that the fact must be alledged to be done against the form of the statute or statutes, (as the case may be) yet it rather seems to be admitted, that if such circumstances are stated as bring the case within the statute, it will be sufficient. It is essentially necessary to show, in some manner, that the offence is against the statute. Such an exception to the general rule, we think, ought to be supported: It is founded upon the most reasonable principles and prevents any advantage being taken merely on account of informality.

The offence in this case is described in the third and sixth sections of the act of one thousand seven hundred and seventy four, except so far as relates to the alteration of the size of the cask by the subsequent act.

By the third section it is provided, that no merchant or person whatsoever, shall lade or ship any shad or herring for exportation out of this province, before he shall first submit the same to the view and examination of the officer, or his deputy, appointed by the directions of this act, who shall search the same &c. The last part of the sixth section, on which the action is principally founded, is as follows: "or if
" any person shall ship off any cask or casks of shad or herring, not branded with the provincial brand mark as aforesaid, every such person so offending, shall forfeit and pay
" the sum of ten shillings for every such cask so shipped."

Since the revolution, the State-arms have, of course, been substituted for the provincial arms.

The declaration recites, "that the defendant, the first
" day of June, A. D. one thousand eight hundred and nine,
" at the county aforesaid, did ship off and export from this
" Commonwealth eighty four casks of herring, which had not

“ been submitted to the view or examination of the officer or
 “ his deputy, by law for that purpose appointed, not branded
 “ with the State brand-mark, whereby, and by force of the
 “ Acts of Assembly of Pennsylvania, in such cases made and
 “ provided, the said defendant hath forfeited the sum of for-
 “ ty two pounds, equal to one hundred and twelve dollars, to
 “ wit, ten shillings for every cask, one half thereof to the in-
 “ former, &c. whereby an action hath accrued, &c.

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The forfeiture of the sum demanded is expressly alle-
 ged to be by force of the Acts of Assembly, in such cases
 made and provided ; and the declaration is further fortified
 by the conclusion, “ whereby an action hath accrued &c.”
 which has an evident relation as well to the Acts of Assem-
 bly as to the circumstances set forth.

It is the opinion of the Court that the circumstances
 stated in the declaration, are amply sufficient to bring the
 case within the Acts of Assembly. The rule must be dis-
 charged.

Rule discharged.

SCHROEDER against MORRISON.

1813.

27 April.

Ripley, for the defendant, moved for a rule on the plain-
 tiff to show his cause of action, and why the defendant should
 not be discharged on common Bail.

The Court re-
 ceived a motion
 for a rule to
 show cause of
 action after the
 expiration of
 the first week
 of the term,
 contrary to the
 rule of Court ;
 because the de-
 fendant had

By a rule of the Court the motion should have been
 made within the first week of the Term ; but the Court re-
 laxed the rule and received the motion, because the defendant
 had been confined in jail, and had no counsel, until after the
 expiration of the first week of the term.

been confined in jail and had no counsel until after the expiration of the first week of the
 term.

CASES

IN THE

District Court

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

JUNE TERM, 1813.

1813.

7th June.

GARRIGUES against VOGDES.

On the trial of an action brought against the drawer of a promissory note, the Court admitted evidence tending to shew that the note was indorsed for the accommodation of the drawer, by whom it was fraudulently put in circulation, and that the plaintiff paid no consideration for the note; and the jury having found in favour of the defendant, the Court, though they were not satisfied with the verdict, would not grant a new trial.

THIS was an action brought by Abraham Garrigues, against Jacob Vogdes, to recover the sum of 500 dollars, with interest, being the amount of a promissory note, dated the 14th day of January 1807, drawn by A. W. & W. Hayman, in favour of said Vogdes, and by him indorsed, payable 90 days after date. The note was given to the Haymans for the purpose of taking up a note of the same amount, previously indorsed by Vogdes for their accommodation, but which they neglected to take up, and which Vogdes was obliged to pay. One of the Haymans, without the previous knowledge of Vogdes, passed the note to Selby Hickman, to whom he was indebted. Hickman failed, and his assignee, Duffield, passed the note to Fricke, to whom Hickman was indebted in a sum less than the amount of the note. In case Vogdes paid the amount of the note, Fricke, who was acquainted with the above circumstances, was to deduct his debt, and 100 dollars for his trouble. Fricke, a short time before the note came to maturity, passed it to the plaintiff, Garrigues, without indorsement. Ten days after the date of the note Vogdes caused an advertisement to be inserted three times in two daily newspapers, to both of which the firm to

which the plaintiff belonged subscribed, forwarning all persons from receiving the note. The note was withdrawn from bank and protested regularly, but Vogdes, who was perfectly solvent, was not sued for nearly a year afterwards. The precise circumstances under which Garrigues received the note, did not appear, he was the creditor of Fricke to an amount greater than the note, and Fricke's clerk testified, that he understood, that the note was given on account; but there were no entries relative thereto in the books of Fricke; and Garrigues did not produce his books, though requested to do so, and to shew the consideration he gave for the note. The plaintiff's counsel objected to the evidence offered at the trial by the counsel for the defendant, to shew the want of consideration between the original parties. The Court admitted the evidence. The Jury having found a verdict in favour of the defendant, *Milnor* and *Bradford* obtained a rule to shew cause why a new trial should not be granted. Three reasons were filed.

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1st. The Court erred in point of law, in admitting the defendant to give testimony to impeach the consideration of the note.

2dly. The verdict is against the charge of the Court in point of law.

3dly. The verdict is against the weight of evidence.

Wallace, for the defendant, opposed the rule.

Milnor. As the statute of Anne did not extend to Pennsylvania, in the year 1715 (a) our assembly passed a special act, for the purpose of establishing the negotiability of promissory notes, by making them assignable by indorsement, and allowing the assignee to sue in his own name.

The Supreme Court, *M'Kean* chief justice, in the construction of this act, decided, that the assignee of a promissory note, took it, subject to all equitable considerations to which the same was subject, in the hands of the indorser, the original payee. (b)

(a) Purdon's Abt. L. P. 23. (b) 1 Dalh. Rep. 444. *M'Cullough v. Houston*.

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This decision had a tendency to destroy the negotiability of notes; the commercial interests of the city and county of Philadelphia required a remedy, and produced the act of the 27th of February 1797 (c) called "the defalcation act," prescribing the form of a promissory note not liable to set-off, containing the words "*without defalcation*" or "*without set-off*."

They are now placed in Pennsylvania, on the same footing as in England; and the decisions under the statute of Anne, therefore, strictly apply here.

The first determination under this second act of assembly, was *Humphries v. Blight's assignees*. (d)

The facts in the case in question, as they appeared on the trial, were, that the Haymans obtained the indorsement of Jacob Vogdes to their note in his favour, dated January the 14th, 1807, at 90 days, for 500 dollars, for the purpose of taking up another note, for that amount, previously indorsed by Vogdes for their accommodation. One of the Haymans passed the note to Hickman, to whom he was indebted. After it came into his possession Hickman was called upon by Vogdes, and requested to give up the note, Vogdes stating the purpose for which it had been given. Hickman refused to deliver it up, alledging, that one of the Haymans was indebted to him. Vogdes immediately advertised it to prevent its negotiation. It came into the possession of Hickman's assignee, who passed it to Fricke, a creditor of Hickman's, who received it with a full knowledge of the facts. Fricke passed it to the plaintiff, to whom he was indebted in a larger sum of money. It did not appear that the plaintiff was informed of these circumstances. The note became due and was regularly protested. The defendant proved that the firm of Garrigues and Marshall were subscribers to the newspapers in which the advertisements were inserted; but it appeared, that the note did not come into the plaintiff's possession, until two months after the advertisements appeared.

(c) Purdon's Abt. 100.

(d) 4 Dall. Rep. 371.

The plaintiff's counsel objected to the evidence, offered on the trial, by the counsel for the defendant, tending to shew the want of consideration between the original parties; the Court admitted the evidence, and the jury found a verdict for the defendant.

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The counsel for the plaintiff have obtained a rule for a new trial, which, they contend, should be granted, for three reasons.

1st. That the Court erred, in point of law, in admitting the defendant to give testimony to impeach the consideration of the note.

Neither want of consideration, nor fraud in the commencement, nor satisfaction, unless indorsed on the note itself, can be given in evidence to defeat the claim of the holder of a note to the value which it purports to convey. (e)

A general warning in a gazette is not sufficient; newspaper notice of a husband, not to trust his wife, is not a sufficient prohibition. (f)

The evidence was illegal, as it tended to influence the jury, and had its effects on the rights of Garrigues, who appeared to be an innocent indorsee.

As the Court erred in admitting the evidence, they will relieve the plaintiff by a new trial. (g)

So if they reject evidence which ought to have been admitted. (h)

Second point.

The verdict was against the charge of the Court, in point of law.

The Court charged the jury, that the circumstance of the advertisements being in the newspapers, was not sufficient to induce a belief that the plaintiff had notice.

(e) 1 Gibb. L. E. 192. 194. 3 Bur. Rep. 1516. 1526. Grant v. Vaughan. 6 Mass. T. Rep. 428. Thurston v. M'Kown. 2 John. T. Rep. 50. Russel v. Ball, &c. 4 Dall. Rep. 370, 371. Humphries v. Blight's Assignees. 7 John N. Y. Rep. 561. Brown v. Mott.

(f) 1 Bac. Abt. 488. tit. Baron & Feme, letter H. See also, 4 John. Rep. 251. 364. Livingston v. Roosevelt.

(g) 2 Bur. Rep. 1216. Edie v. East India Co.

(h) 3 Mass. Rep. 124. Middlesex Canal Corporation v. M'Gregore.

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No other evidence was given to induce a belief that Garrigues had any notice whatever.

The Court were correct, as has been shown by authorities, and the verdict, being clearly against their charge, ought not to stand.

Third Point.

The verdict was against evidence. Hickman was certainly an innocent indorsee and might have recovered; it appeared, that he knew nothing of the fraud, until after he had received the note, and therefore he was not to be affected. (m) In England, it has been decided, that any holder may recover against the drawer or indorser, if he give a valuable consideration. (n) In this country, it has been held, that though there be cases, in which, after the negotiation of a promissory note, the maker will be let into proof of its having been fraudulently obtained, yet no case has gone so far as to say, that this can be done, where the transfer was prior to the note becoming due. (o)

Wallace, against the rule.

If ever real and substantial justice was done by a verdict, the present is the case. Where justice has been done, the Court will not grant a new trial, although the verdict should be against the strict letter of the law.

But the verdict in this case is in strict conformity with law.

In every point of view the case is very hard, as respects the defendant; and every sentiment and feeling is in his favor. Under these circumstances, the plaintiff must make out a very strong case indeed, before the Court will grant him a new trial. (p)

(i) 2 Bur. rep. 1216. Edie v. East India Co. 1 John. Cases 279. 280. Van Renselaer v. Dole. Ibid 336, Silva v. Low.

(m) 4 John. Rep. 251. 276. Livingston v. Roosevelt.

(n) Kidd on Bills Dub. ed. 1791. 158, 160.

(o) 2 John. Rep 50. 51. Russel v. Ball.

(p) Bathurst J. & Wilson rep. 306.

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Vogdes lent the first note to Haymans ; when it came to maturity he lent them the second note to renew the first. Haymans fraudulently appropriated the second note to a purpose never intended by Vogdes, and left Vogdes to pay the first note. Vogdes gave immediate notice in two newspapers. Afterwards, hearing that the note was in the hands of Hickman, he waited on him ; Hickman said Hayman was indebted to him and he would hold the note. One of the Haymans was Hickman's son-in-law and lived in his house. Hickman did not pretend that Hayman had paid him the note on account of his debt. He was in possession of it and said he would hold it. Hickman failed ; Duffield was appointed his assignee and the note was handed over to him. Hickman was indebted to Fricke, to whom the note was delivered, under an agreement that provided the note was paid, to allow him, besides his debt, one hundred dollars for his trouble. There was no fraud between Hickman and Fricke: the latter was a mere trustee. In what manner it was passed to Garrigues does not appear ; there is no satisfactory evidence on the subject. Fricke's clerk understood, that it was given on account of the debt, but there were no entries in Fricke's books ; Garrigues was not debited, nor was Fricke credited, with the note.

Garrigues did not produce his books, though he was called upon to do so, and to give evidence of the consideration given for the first note. The note was withdrawn from bank, and not sued out for nearly a year.

Under these circumstances I contend,

1st. That Garrigues was a holder without consideration.

2dly. That he had notice or a knowledge of the circumstances under which the note was obtained.

An indorsee, without consideration, may be effected with any equity or objection that will avail between the original parties.

What was the consideration that passed between Fricke and Garrigues ? Did the latter pay any money, deliver any goods, or forbear any suit ? Neither. He was not a whit worse after non-payment of the note, than before he took it.

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There was no consideration. A consideration implies something actually paid, or some advantage forborne.

2dly. As to the notice. There is always a difficulty in cases like the present, in proving actual notice; but it is fully proved by circumstances. Fricke owned only a part of the note; it is not probable therefore that he passed it to Garrigues without informing him of the facts. The want of the entries in the books; the withdrawing of the note from bank; the tardiness in bringing the suit, and the notices in the newspapers. all shew that Garrigues was conversant of the facts, and if so he had no right to recover.

Bradford for the plaintiff, in reply. It will always afford consolation to a Court, granting a new trial, that there will be a review of the case, where justice will be administered between the parties. It is not so where the court happen to err in refusing a new trial. It is admitted that Vogdes has been defrauded out of the note in question, by the Haymans, but the sanctity of commercial paper forbids that defence in this case. In the hands of Hickman the note was with a *bona fide* holder, and we are at liberty to protect ourselves under him. With respect to the consideration between Fricke and Garrigues, there was a *forbearance* of the latter, which is a good consideration. It matters nothing through how many fraudulent hands the note passed, if before it was due it came, *bona fide*, to the possession of the plaintiff. The delay in bringing suit forms no objection; as to the newspaper notice, that is insufficient. If the principles contended for by the defendant's counsel were adopted by the Court, then no one could recover on a note, unless he was a regular merchant, and entered it in his books.

PER CURIAM, HEMPHILL *President*.

This action was brought by the indorsee against the original indorser of a promissory note. The evidence was clear that the note was given for the accommodation of the maker, and was intended to renew an accommodation note that had

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been previously given. The maker, however, fraudulently omitted to take up the first note, and the defendant was obliged to pay it. The second note was afterwards fraudulently put into circulation, without the knowledge of the defendant. Notice, by the defendant was given to the plaintiffs of the fraud that had been practised against him, alledging in the notice that a knowledge thereof had been communicated to the plaintiffs before the note had been received by them. The plaintiffs were likewise called upon to prove, at the trial, what consideration they gave for the note.

The light in which the Court considered this case at the trial, is in some degree changed by the decision in the case of *Holmes against Karsper*. (a) By that decision, if the defendant proves that the note indorsed by him was put into circulation by fraud and falsehood, he has *made out his case*, and has done enough to entitle him to a verdict, unless the plaintiff clears himself of suspicion, and shews in what manner he came to the possession of the note, and what he paid for it.

In this case the plaintiff says that they gave full consideration for the note, and were unacquainted with the circumstances in which it was put into circulation. They also contend that they were at liberty to protect themselves under *Hickman*, a prior innocent holder of the note, who could have recovered on the note, and who had a right to part with all the interest he had in it.

This position at present does not appear to us to be unreasonable, or irreconcilable with the principles of law in other cases; but even admitting it to be tenable, it was nevertheless incumbent on the plaintiffs, upon the principle laid down in *Holmes against Karsper*, to shew in what manner the prior holder came to the possession of the note, and what he gave for it; for after the testimony given by the defendant, he had made out his case, and the plaintiffs were then bound to prove any thing that was necessary to entitle them to recover. But on this head there was no satisfactory evi-

(a) 5 Bin. Rep. 469.

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dence to shew that Hickman was an innocent holder of the note, or how he came to the possession of the note, or what he paid for it.

The ground on which the plaintiffs principally relied, at the trial, was that of their coming fairly to the possession of the note for a full consideration. The defendant, on the other hand, insisted that there were facts given in evidence sufficient for the jury to presume a knowledge, on the part of the plaintiffs, of the circumstances attending the note, and also that they gave nothing for it. The jury must, however, have formed their opinion upon the first part of the defence. As to that, the evidence was, that the defendant had inserted advertisements in two of the daily papers of this city, cautioning all persons against taking the note, which were continued three days in each paper. The plaintiff's firm were subscribers to both of the papers, but had not received the note until near two months after the appearance of the advertisements.

It appeared that Fricke, the immediate prior holder of the note, and who passed it to the plaintiffs, had full knowledge of all the circumstances attending the note; he was to have one hundred dollars for his trouble in collecting it, to be allowed by Hickman, who was said to have been the first holder, and to detain a debt of about two hundred dollars, which Hickman owed him. Fricke was indebted to the plaintiffs, and, as his clerk understood, the note passed to the plaintiffs on account of that debt. Fricke *did not endorse the note*, but the clerk believed that there was a proviso that Fricke should be accountable to the plaintiffs, if it was not recovered. There was no evidence that any danger was apprehended in recovering the note on account of the solvency of the defendant. Fricke kept regular books, yet the plaintiffs were not charged in the books with the note, or any credit on account of the transaction given to Fricke; and it was admitted that there was no entry in the plaintiff's books relating to the note, or any discharge of Fricke's debt. Fricke was stated to be in credit at the time, but soon after failed. There was some other evidence, but of less importance.

The Court, at the trial, in substance expressed it as their opinion, that the evidence was too weak to charge the plaintiffs with a knowledge of the circumstances under which the note was put into circulation. The jury, however, have drawn a different conclusion, from facts and circumstances peculiarly within their province. The Court will never hesitate in setting aside a verdict that is given against law ; but in matters of fact the Court will exercise its controuling power over verdicts with great caution. Although not satisfied with the verdict, in the present case, the Court decline disturbing it.

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The rule discharged.

BYRNE against GORDON.

1813.

7th June.

THIS suit, which was brought by Patrick Byrne, executor of John G. Kennedy, deceased, against Elisha Gordon, was founded on a special agreement, said to have been made by the defendant with the plaintiff's testator, to allow him eight hundred dollars per annum for superintending a Brewery, and teaching the defendant's son to brew malt liquors.

The pleas were "*non assumpsit* and payment;" to which the plaintiff replied "*non solvit*:" whereupon issue was joined.

The jury gave a verdict for less than one hundred dollars.

On motion of *Sergeant*, for the defendant, a rule was obtained to shew cause why judgment should not be entered, without costs.

It was opposed by *Hopkins* and *S. Levy*, for the plaintiff.

The question arose upon the proviso to the first section of the Act of Assembly, giving jurisdiction to the District

This Court has jurisdiction in those cases only where the sum SUBSTANTIALLY in controversy exceeds 100 dollars. The verdict is sometimes, but not always, the rule to ascertain the sum in controversy. In torts and trespass, it depends on the demand laid in the declaration. In ejectment, it may be established by affidavits. In some cases, the Court will judge from the circumstances appearing on the trial.

1813. Court for the City and County of Philadelphia, the words of which are as follows: "Provided that the said Court shall have no jurisdiction, either originally or on appeal, except where the *sum in controversy* shall exceed one hundred dollars."

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PER CURIAM.

HEMPHILL, *President*.

A rule to shew cause why judgment should not be entered, without costs, has been entered in this case, the verdict being for less than one hundred dollars.

The Act of the 30th of March, 1811, which established the District Court for the City and County of Philadelphia, gives jurisdiction only in cases where the *sum in controversy* exceeds one hundred dollars.

A question relating to costs, in this Court, does not bear a strict analogy to a question of costs in the Common Pleas, or formerly in the Supreme Court, under the Act of the 25th of September, 1786.

In the One Hundred Dollar Act of 1804 is the following clause: "That if any person shall commence, sue, or prosecute any suit or suits, for any debt or debts, demand or demands, made cognizable as aforesaid, in any other manner than is directed by this Act, and shall obtain a verdict or judgment therein, which, without costs, shall not amount to more than one hundred dollars, not having caused an oath or affirmation to be made, before the obtaining of the writ of summons or capias, and filed the same in the prothonotary's office respectively, that he, she or they so making oath or affirmation, did truly believe the debt due, or damage sustained exceeding one hundred dollars, he, she or they so prosecuting, shall not recover cost in any such suit."

The Act of the 25th of September, 1786, provided, "That if any plaintiff shall bring or commence any suit or action in the Supreme Court, and shall not recover there-

“ upon more than fifty pounds, he shall *not be allowed any costs.*” In the above cases the legislature have made the costs to operate by way of penalty, but the jurisdiction is not affected by the recovery of a less sum than is sufficient to carry costs. Upon a foundation similar to the above the jurisdiction of the Circuit Court of the United States rests in suits of a civil nature. By the 11th section of the Judicial Act “ The Circuit Court shall have original cognizance of all suits of a civil nature, at common law, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars ;” but by the 20th section it is declared, “ That if less than five hundred dollars is recovered, the plaintiff shall not be allowed costs, but, at the discretion of the Court, may be adjudged to pay costs.”

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No provision is contained in any Act, making the costs in the Court operate by way of penalty, to keep the party within the limits of other tribunals. If the Court has jurisdiction the party will be entitled to costs, and the difficulty is to ascertain the jurisdiction, no rule being prescribed in the Act for that purpose. In the One Hundred Dollars Act and Fifty Pounds Act alluded to, the costs, by the words used by the legislature, are to depend on the verdict or recovery ; but the Act establishing this Court has not made the verdict or recovery the test of jurisdiction. A case like the present perhaps might occur under the Act of the 20th of March, 1810, giving original jurisdiction to the Supreme Court within the City and County of Philadelphia, in all civil actions wherein the matter in controversy shall be of the value of five hundred dollars.

A question of jurisdiction resembling the present in a considerable degree arose in the case of Wilson against Daniel, in the Supreme Court of the United States. (a) It was a case of error from the Circuit Court of Virginia. The Judicial Act, in such cases, provides that there shall be no removal of a civil action, from the Circuit Court into the Supreme Court, unless the matter in dispute exceeds the

(a) 3 Dall. Rep. 401.

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sum of two thousand dollars ; in that case the second exception to the record was, that the judgment was not for a sum of sufficient magnitude to give jurisdiction to the Supreme Court. The reasoning of the judges on the subject applies here with much force. On the exception there was a diversity of sentiments ; but it was the prevailing opinion of the Court, that they were not to regard the verdict or judgment, as the rule for ascertaining the value of the matter in dispute between the parties. So in the case before us, the Court think that the verdict is not always to be resorted to, as giving the rule to ascertain the sum in controversy. The Act creating the Court forms no such test. It must often depend upon the circumstances appearing in each particular case : no uniform rule can with safety be laid down. If the demand of the plaintiff, laid in the declaration, was adopted as the criterion, then every plaintiff, by laying the demand proportionably high, might give jurisdiction to the Court ; yet in torts or trespasses this can be the only practicable test. In the case of an ejectment the Court would be obliged to receive affidavits as to the value of the controversy ; but in most cases it may be ascertained from the nature of the dispute and the evidence in the cause.

To give a reasonable construction to the Act, the Court must always look to the substantial controversy between the parties, unembarrassed by technical rule.

In an action on a promissory note, for instance, the principal and interest is the sum in controversy ; for goods sold, the value of the goods ; for work done, the value of the work, and in these cases the verdict will ascertain the jurisdiction. If the plaintiff's demand is reduced by set-off, the jurisdiction will not be affected ; but if it is reduced by direct payments, the plaintiff ought to have preferred his claim in another tribunal.

In torts or trespass the plaintiff's demand, in the declaration, must of necessity be the criterion, and in all cases savouring in reality of damages, and where there is no mode of computation, the same rule must prevail. The case before the Court was founded upon a special contract, which was

proven at the trial, that the peculiar circumstances of the case induced the Jury to find damages for a sum less than one hundred dollars; yet the court was of opinion that the substantial controversy between the parties exceeded that sum.

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BYRNE
against
GORDON.

Rule discharged and judgment entered for damages and costs.

THE CASE OF THE OLYMPIC THEATRE.

1813.

7 June.

THE Olympic Theatre situate at the north-east corner of Walnut and Ninth streets in the city of Philadelphia, late the property of Victor Pepin and John Baptiste Cashmere Breschard, having been sold by the Sheriff, by virtue of process out of this court and the proceeds, twenty-six thousand dollars, being brought into court, many questions arose as to the distribution of it. In order to ascertain the facts relating to the different claims the court, by consent, appointed a Commissioner, who made the following report.

Quere? Whether the lien of a Mechanic for work or materials extends to the lot on which the building is erected, or is confined to the building.

For materials furnished with a view to the erecting and constructing of a building tho' delivered before the commencement of the building a lien is created.

To the Honourable the Judges of the District Court for the City and County of Philadelphia.

Having been appointed by your Honours, Commissioner to ascertain and report the amounts and circumstances of the

But for materials furnished after the building was completed there is no lien.

Nor is any lien created for work or materials to repair a building.

But if the principal part of a building is torn down and rebuilt, this is a construction within the meaning of the acts of Assembly.

So if the gable end of a building is torn down and a new building is erected adjoining on that side and opening thereto the workmen employed and material men furnishing materials to such new building have liens on the new building; but not on the old one. Whatever is a necessary accessory to the enjoyment of the inheritance is subject to the lien; as the permanent stage in a Theatre; But the moveable scenery and flying stages are not.

It is a principle in equity that a person having two funds shall not, by his choice, disappoint another having only one.

Therefore, where the gable end of an old building, erected on one lot, was torn down and a building was erected adjoining and opening thereto, on another lot, the court directed two mortgages which were given on the lot previously to the commencement of the new building to be paid out of the proceeds of the first lot leaving the value of the building on the second lot for the lien creditors, together with the lot itself; if the court should finally be of opinion that the lot was liable to the mechanic's liens.

F

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different incumbrances and liens existing against the Olympic Theatre and lot of ground thereto belonging, situate at the North East corner of Walnut and Ninth streets in the city of Philadelphia, recently sold by the Sheriff, as late the property of Victor Pepin and John Baptiste Cashmere Breschard, at the suit of John Leadbeater and William Sheldon, I beg leave to report them to your honours as follows, to wit :

Messrs. Pepin and Breschard received on the 4th of October 1808, from John Brown a deed for a certain lot of ground situate on the north side of Walnut street and east side of Delaware Ninth street, in the city of Philadelphia, containing in breadth on Walnut street 96 feet 6 inches, and in length or depth on Ninth street 120 feet. The consideration mentioned in the Deed is \$11,000. In the latter end of the year 1808 and beginning of 1809, they erected a riding Circus on the lot 80 feet front on Walnut street and 100 feet deep on Ninth street. It does not appear that any claims have been filed for work done or materials furnished at the original erection of this building. On the 1st of February 1811, John Brown conveyed to Pepin and Breschard a piece of ground adjoining that last described, containing 20 feet on Ninth street and extending 96 feet 6 inches back. The consideration mentioned in the Deed is \$6250. This second piece of ground was purchased for the erection of an addition to the building, so that they might use it for a Theatre. On the 15th of March 1811, the second lot was regulated by Reading Howell, Esq. for building. The north gable end of the old building was torn down in the latter end of February and beginning of March 1811. The hands finished tearing it down on the 22d of March 1811. They commenced the additional building, which extends forty feet on Ninth street, and to a line with the eastward side of the old building, which is 80 feet from Ninth street, about the time of regulation of the lot. When the second building was erected the boxes in the north section of the old building were taken out and a stage erected, which occupies all the additional building and extends 21 feet into the old house. A great number of alterations were made to the old building; three new flights of stairs

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were made; the fronts of several boxes taken out and new fronts put in. That part of the old stuff that could be used in making the new fronts was worked up into them. The columns which supported the boxes, galleries and dome in the eastward, southward and westward of the house, which were originally square, were rounded as they stood and new reeding put on them. That part of the dome next the new building was secured to the roof, the columns next the stage having been taken out. Several new boxes were erected on each side near the stage. A new ring was put round the area and some other repairs and alterations made.

The second building was opened for Theatrical exhibitions on the first of January, 1812, tho' not then entirely finished. The building, properly so called, was considered as finished in the latter end of January, 1812, tho' the hands worked at the stages, scenery, &c. afterwards.

A part of the lumber and materials furnished and work done, for which claims have been filed, were for the scenery and flying stages for dramatic exhibitions. Whether such work is a lien on the building or not, your honours will decide. Such parts of the Scenery as were attached to the building by ropes or other means were sold by the Sheriff, with the building to the purchaser James Clemson. On the 4th October 1808, Victor Pepin and John B. C. Breschard executed a mortgage to John Brown, on the lot they purchased of him the same day, containing 96 feet 6 inches front on Walnut street and extending in depth 120 feet on Ninth street, for securing the payment of \$7558, as follows, \$1500 part thereof, with interest on the 1st day of February, 1809. \$2000 more thereof, on the 1st day of October, 1809. \$2000 more thereof on the 1st day of October, 1810, and \$2058 the residue thereof on the 1st day of October, 1811, with interest for the same, payable annually. Recorded on the day of the date.

On the 1st of February, 1811, they executed a mortgage to John Brown, on both the Lots, containing together 96 feet 6 inches on Walnut street, and 140 feet on Ninth street, for securing the payment of \$6250 on demand, with interest. Recorded on the 19th March, 1811.

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On the 7th of October, 1811. A mortgage was executed on both the Lots, as last described, to John P. L. Duffon of New York for securing the payment of \$1700 on the 7th of October, 1812. Recorded on the day of the date.

I have not seen this mortgage, but by the record it appears to have been drawn in the names of both Pepin and Breschard, and purports to have been acknowledged by both, before Alderman Shoemaker, although only signed by Victor Pepin.

On the 22d of February, 1812, Victor Pepin and John B. C. Breschard executed a mortgage to James Clemson, on the whole of the premises sold by the Sheriff, for securing the payment of \$12,400 as follows, \$1200 part thereof in one year from the date, and \$11,200 the residue thereof in two years from the date, without interest. Recorded 5th May, 1812.

On the 2d of May, 1812—They executed another mortgage to James Clemson on the whole of the premises, for securing the payment of \$4000 with interest from the date of the Mortgage. Recorded 5th of May, 1812.

On the 2d of May, 1812—They executed a Mortgage to James L. Vauclein, on the whole of the premises for securing the payment of \$800 with interest from the date of the Mortgage. Recorded 6th May, 1812.

John Warnock, Nail Manufacturer, furnished Nails used in the erection of the building, from the 18th of July, 1811, until the 21st of April, 1812, to the amount of \$355 55-100. He has received on account of his bill \$254 55-100, leaving a balance due him of \$101, on the 12th of May, 1812. His claim was filed on the 21st of April, 1812.

John Y. Bryant, furnished Paints used in the said building from 17th October, 1811, until the 11th of April, 1812, to the amount of \$354 44-100. Pepin and Breschard in an instrument of writing signed by them on the 11th of April, 1812, acknowledged the amount to be due to Dr. Bryant, and that the Paints were used in the building. His claim was filed 28th April, 1812.

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James Harper, Brick-maker, furnished bricks used in the building from 18th April 1811, until the 25th November in the same year, to the amount of \$455 20-100. His claim was filed April 16th, 1812, for the amount. On the 1st of May, 1812, an amicable action, in the nature of a *scire facias* on the claim, was entered, and on the same day judgment entered thereon for the amount of the claim.

William Greble, the contractor for the building did work and furnished materials at the erection and construction of the same, from the 6th February, 1811, till the 26th December in the same year, to the amount of \$1,118 32-100. He filed his claim for the amount, April 16th, 1812. On the 1st of May, 1812, an amicable action in the nature of a *scire facias* on the claim was entered, and on the same day Judgment entered thereon for the amount of the claim.

Daniel Hughes, Lumber Merchant, furnished lumber used in the erection of the building, from 8th December, 1810, until 4th June, 1811, to the amount of \$555 85-100. On the 1st of May, 1812, an amicable action for the recovery thereof was instituted and on the same day Judgment was entered thereon.

Joseph Parham, Lumber Merchant, furnished lumber to the building from 1st June, 1811, until 14th May, 1812, to the amount of \$1952 46-100. He filed his claim on the 16th May, 1812, for the amount. A *scire facias* on the claim issued to September Term, 1812, No. 196, which was arbitrated, and on the 29th July, 1812, a report was filed for the sum of \$1968 10-100 on which Judgment has been entered.

Samuel Pancoast, junr. furnished Ironmongery used in and about the building from the 24th of August, 1811, until the 19th of April, 1812, to the amount of \$183 62-100. On account of which he has received \$83 62-100, leaving a balance due to Mr. Pancoast of \$100 his claim was filed on the 19th of May, 1812.

John Sims, Painter and Glazier, did painting and glazing and furnished glass to the building from 27th August, 1811, until 27th May, 1812, to the amount of \$252 82. His

1813. claim was filed on the 16th June, 1812, for \$108 10, the balance then due to him.

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William Strickland, did scene painting at the building in the months of January and February, 1812, on account of which there is due to him \$100 for which sum he filed his claim on the 11th July, 1812. The principal part of the work for which this claim is filed was the painting on the drop curtain near the Front of the Stage.

John Strickland, Master Carpenter, did Carpenter's work at the building from 19th December, 1811, until the 9th of May, 1812, on account of which there is due to him \$100 for which sum he filed his claim on the 11th of July, 1812.

Samuel Craig, Blacksmith, did Iron work for the building from 2d January, 1811, until 11th May, 1812, on account of which there is due to him \$17 25-100. His claim was filed on the 31st July, 1812.

John Wilson, Marble Mason, furnished marble and put it up in the building in April, 1812, to the amount of \$56 93 for which he filed his claim on the 4th of August, 1812.

David Prentice, furnished cast rollers and weights to the building from 17th October, 1811, until 31st December in the same year, on account of which there is due him \$60 37. He obtained Judgment for the amount on the 3d of July, 1812, before Esquire John Baker, a transcript of which was filed in the Common Pleas, on the 16th January, 1813.

Robert Welford, furnished ornamental-compositions to the building and fixed the same on the 1st November, 1811. On account of which there is due him \$60 for which sum he filed a claim March 9th, 1813.

James Riddle, Carpenter, did Carpenter's work at the building from 1st January, 1812, to 9th of May in the same year, on account of which there is due to him \$15 for which sum a claim was filed on the 9th March, 1813.

There are the following Judgments on Record against Pepin and Breschard.

C. P. John Brown v. Pepin and Breschard

D. S. B. 23d April, 1811, \$12500 00

DISTRICT COURT.

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Edwards D. C. Thomas Clemson v. the same as his second mortgage J. 12,185 4th May, 1812,	\$ 503 08	1813.
Rawle D. C. James L. Vauclain v. same D. S. B. D. C. B. & I. Bohlen v. same J. 12,499. May 20, 1812.	1600 00	The Case of the OLYMPIC THEATRE.
Wallace S. C. David Parrish v. same, March 12, 97 May 23, 1812.	300 31	
Hopkins D. C. Thos. Beaumont v. same June 12, 236. June 11, 1812.	1000 00	
This is on an award of arbitrators, from which an appeal has been entered by the defendants.		
Browne D. C. Thos. G. Louffer v. P. & B. June 12, 419. July 8, 1812.	2071 16	
do. D. C. John Browne v. same June 12, 417.	405 33	
Hopkins D. C. John Leadbeater & Wm. Sheldon v. same, S. 12, 178. July 20, 1812,	406 66	
Delany D. C. Charles Bird & Co. v. same, June 12, 204. Aug: 8, 1812.	484 49	
Hyat & Golden v. same, June 12, 431. Sept: 7, 1812.	302 07	
Tod S. C. John Rea v. same, June 12, 95. October 19, 1812.	do	
Norbury C. P. John Binns v. same, S. 12, 192. Oct. 21, 1812.	1672 65	
D. C. Leonard Englehart v. same, S. 12, 605. Oct. 22, 1812.	95 87	
Newcomb D. C. John Canning v. same, Dec: 12,215, Oct. 22, 1812,	250 00	
D. C. Leon. Englehart v. same, Sept: 12,607, Nov: 10,	455 00	
There are City, County, Poor and Health Taxes, due on the building and lot for the year 1812, to amount of	982 01	
The property was sold to James Clemson on the fifth day of February 1813, for \$26000. All which is respectfully submitted.	96 46	

JAMES M. PORTER.

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On the third day of June, one thousand eight hundred and thirteen, the Court appointed John Moore (bricklayer,) Alphonso C. Ireland and James Ash, to ascertain how much of the amount of sales of the Olympic Theatre and lots of ground, thereunto belonging, could fairly be supposed to have arisen from each lot, and each building.

These gentlemen performed the duty, and reported to the Court, the valuation as follows :—

The lot on Walnut-street	\$ 8400
The Buildings on that lot	5300
The Lot on Ninth-street	2800
The improvements on that lot	9500

aving regard to the sale, to the amount of 26,000.

Upon these facts the following questions arose.

1st. Whether the lien of a mechanic, for work or materials, extended to the *lot* on which the building is erected, or is confined to the *building*.

2dly, Whether for materials furnished, *before the building was commenced*, there existed any lien.

3dly, Whether for materials furnished *after the building was completed*, there existed any lien.

4thly, Whether any lien was created for work or materials to *repair* a building.

5thly, Whether, if the principal part of a building is torn down and rebuilt, there are any liens created in such rebuilding.

6thly, If there is a lien for such a rebuilding, on what does it attach ; the old building or only the new one.

7thly, Whether there existed any lien on the stages and scenery or any part.

8thly, Whether the court had power to direct the payment of the two mortgages out of the proceeds of the first lot, so as to leave the proceeds of the second lot, together with the building erected thereon, as a fund for the lien creditors, if the court should be of opinion that the lot was liable.

It was argued by *Atherton, Browne, James S. Smith, Ewing, Bradford and Samuel Shoemaker*, respectively, for the lien creditors, and by *Wallace* on the other side. 1813.

The Case
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The Court, *Hemphill* President, gave the following opinion.

In the case of the Olympic Theatre and certain lien creditors under the act of the 17th of March 1806, and its supplement.

Several points have been proposed for the consideration of the court.

First, That the lien extends to no part of the lot on which the building stands, but is to be confined to the value of the building only.

Second, That materials only which are furnished for, or in the erection or construction of the building, and before the building is finished can create a lien.

Thirdly, That no lien can be created for the repairing of a house.

Fourthly, That the building only which is erected is subject to the lien and not any other to which it is attached:

These are the general propositions submitted to the court but in this particular case, other incidental questions have arisen.

Two lots adjoining each other were sold.

There were two mortgages previous to the commencement of the building; the first embraced one of the lots and the second included both. The building was principally on the lot not embraced by the first mortgage, and the court are asked to direct the two mortgages to be paid out of the proceeds of the first lot, so as to leave the proceeds of the second lot, together with the building erected thereon as a fund for the lien creditors.

Another question in relation to the stage and scenery has been raised, and that is, whether they are to be considered as a part of the building and subject to the lien.

There are other mortgages and general judgment creditors in this case; but their liens originated subsequent to the commencement of the building.

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As to the second, third and fourth questions the court are of opinion, that materials furnished after the building is finished, cannot create a lien. It is distinguishable from the case of materials furnished, while the building is in a progressive state, and which are fraudulently applied to other purposes.

In that case every thing is done that the act could reasonably require, and it would be impracticable for the person furnishing the materials to see that every nail or other article furnished was actually employed in the building; but common care and prudence are wanting, when a man furnishes materials after the building is finished.

The court are further of opinion, that the act of repairing a house creates no lien, within the meaning of the legislature: nor is any building subject to the lien except the one erected. If the principal part of a building should be torn down and rebuilt; upon a liberal construction of the act, it ought to be considered as creating a lien.

As to directing the two mortgages to be paid out of the proceeds of the first lot. The court are of opinion that persons whose liens originated subsequent to the commencement of the building stand in no better situation than the owner himself, for they must be presumed to have notice of the commencement of the building; the new appearance of which being sufficient to put them upon an enquiry, and it is a principle in equity that a person having two funds, shall not, by his choice, disappoint another, having one only: the latter may be permitted to stand in the place of the former. Upon the application of this principle, the court may with propriety direct the two mortgages to be paid out of the proceeds of the first lot, leaving the value of the building on the second lot for the lien creditors, together with the proceeds of the lot itself, if the court shall finally be of opinion that the lot is liable.

As to the stage and scenery.

This question bears a near analogy to the doctrine of fixtures. Questions of this description principally arise among three classes of persons, 1st between the heir and

executor, 2dly, between executors of tenant for life or in tail and the remainder man and reversioner, and 3dly, between landlord and tenant.

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The rule varies when applied to the different classes. The greatest indulgence in favour of considering particular articles as chattels is allowed in the case between landlord and tenant, and the greatest rigour in favour of the inheritance, obtains between the heir and executor.

The general rule appears to be, that where the instrument or utensil is an accessory to any thing of a personal nature, as to the carrying on a trade it is to be considered a chattel; but where it is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part of the inheritance.

In *Lawton against Lawton (a)*, it is said, by the lord Chancellor, that coppers and all sorts of brewing vessels cannot possibly be used without being as much fixed, as fire engines in a brewing house, especially as pipes must be laid through the walls and supported by walls; and yet notwithstanding this, as they are laid for the convenience of trade, the landlord will not be allowed to retain them: and in the above case it was determined that a fire engine set up for the benefit of a colliery was to be considered as a personality. In respect to a cider mill, it may be considered a mixed case, between enjoying the profits of the land and carrying on a species of trade yet in a case between the heir and executors Lord Baron Comyns, held it to be a chattel and allowed it to go to the executor. In the present case, the permanent stage is so fixed to the freehold, that it ought to be considered as a part of it. But the moveable scenery and flying stages are not necessary accessories to the enjoyment of the inheritance. They were only necessary for the purposes of theatrical exhibitions; which, in this respect must be considered as a species of trade. We are therefore of opinion, that they do not belong to the inheritance, and consequently are not subject to the liens, particularly when conflicting with the claims of execution creditors.

(a) 3 Atk. 13.

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In the discussion of the present case a question was agitated, whether materials furnished previous to the commencement of the building could create a lien. If they were furnished with a view to the erecting and constructing of the building the court think that a lien would be created.

The first question is held under advisement.

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7th June.

SHOEMAKER *against* LIVEZELY.

The Court possess the power to grant new trials for excessiveness of damages in all cases of torts, except crim. con.

In torts, generally, the Court would not grant a new trial merely because they were dissatisfied with the verdict.

THIS was an action of trespass brought by Jonathan Shoemaker against John Livezely, for taking away his goods and chattels. At the trial the defendant did not appear either in person or by attorney.

It appeared in evidence that John Livezely had obtained a judgment against Jacob Shoemaker, the father of the plaintiff, and had taken out an execution which was posterior to three other executions, one of which was at the suit of the United States.

It also appeared that by virtue of several deeds, at different periods, the last of which bore date the seventeenth of January, one thousand eight hundred and seven, Jacob Shoemaker had assigned to a number of his creditors all his partnership and private property, for the use of his creditors generally, upon certain stipulations contained in the deeds and giving preference to certain classes of his creditors, but notwithstanding the assignment or prior executions, the goods remained in the possession of Jacob Shoemaker. On the twenty-sixth of the same month the trustees gave Jacob Shoemaker a power of attorney to act for them.

Notice was given to Livezely of the assignment and prior executions by the under Sheriff, when he took the execution to the sheriff's office, but not of the power of attorney; and he insisted on a levy being made, and went with the officers to the house of Jacob Shoemaker, who was then in

prison, in another civil action. When in the front room, which was called the compting room he was informed that the plaintiff was in partnership with his father, and that one half of the things there belonged to him, he was also warned by some of the trustees, that whatever was not Jonathan's had been assigned to them ; he however insisted on proceeding, in consequence of which an indemnifying bond was given and a levy made.

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LIVEZELY.

In the counting room, every thing was levied upon, including notes of hand, policies of insurance, &c. but articles of this description were returned. Among other things in the compting room, Barclay's Dictionary and Kid on Exchange were taken. The inventory contains five Book Cases, three of which were in the compting room, to wit : a large pine book case, one ditto with drawers, a book case containing sundry books, and papers in drawers. In the room over the kitchen a mahogany book case containing sundries. In the front room of the third story a book case.

Previously to the sheriff's sale a subsequent notice was given by the attorney of Jacob Shoemaker, that the property of Jacob Shoemaker was assigned.

As to what property belonged to Jonathan, the plaintiff, his father, Jacob Shoemaker testified as follows : The chest of tools belonged to my son, the gun belonged to a gentleman at St. Thomas, it was in my possession, my son had an umbrella, the dictionary, Kid on exchange, and the walnut book case belonged to Jonathan ; there was no walnut book case mentioned in the inventory ; three of the book cases are mentioned as pine or mahogany, two are not described, one of these was in the compting room, and the other in the front room of the third story, and which of these was Jonathan's was not ascertained. The proof was not clear, that any thing belonging to Jonathan was sold, except the Dictionary, Kid on Exchange and a Book Case.

The levy was made on the seventeenth of March, one thousand eight hundred and eight ; Jonathan the plaintiff, at the time of the levy, and at the time of the action brought

1813. was a minor, and no damages were claimed on account of the joint property in trade.

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LIVEZELY.

The jury gave a verdict for FIVE THOUSAND DOLLARS damages.

A rule was obtained to shew cause why a new trial should not be granted on account, among other grounds, of the excessiveness of the damages.

It was argued for the rule, by *Razle* and *Lewis*, and against it by *Phillips*, *Hare* and *Hopkinson*.

THE COURT, HEMPHILL, *President*, gave the following opinion.

On the seventeenth day of January, one thousand eight hundred and seven, Jacob Shoemaker made an assignment of all his private property to trustees. On the twenty-sixth of January, one thousand eight hundred and seven, the trustees gave Jacob Shoemaker a power of attorney by virtue of which, as the court supposed, and so expressed it as their opinion, on the trial of the action between the trustees and Livezely, he was constituted the agent of the trustees, and in that character *his* possession was to be considered as the trustee's : and, as the execution did not come until after the acceptance of the assignment by the trustees, which was evidenced by their act, in creating the power of attorney, that in equity, if no fraud was intended, the assignment ought, at least, to take effect from that time ; and thence the possession remained consistent with the deed, and so continued when the execution was levied. There was but a lapse of nine days, between the date of the assignment and the power of attorney.

But of the existence of this power of attorney, which, in the opinion of the court, protected the goods from Livezely's right to levy, he had no knowledge, from any thing that appeared in evidence ; he had therefore good reason to consider himself in the exercise of a lawful right ; but whether he was right or wrong in levying on the property assigned, he had no right to levy upon the property of a stranger. If he has done wrong he is answerable : but to whom ? No one man has

a right to recover, for a wrong done another. If Livezely was a trespasser the rights of different persons were violated, and the principal wrong, which was of a nature to swell the damages beyond the actual injury, was done to Jacob Shoemaker, on account of the unlawful entry into his house (which was his castle), and the invasion upon the peace and quietness of his wife and family, and the act of going through and searching every part of his house, from the kitchen to the garret. Next, was the injury done to the trustees, in seizing and selling the property assigned; this however, was adjusted in another suit. Lastly, was the injury done to Jonathan Shoemaker, the plaintiff, in taking and selling the few articles that have been mentioned.

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LIVEZELY.

We are now called upon to say whether the damages given are not excessive, and whether a new trial ought not to be granted, for that reason.

The power of the court to grant a new trial in such a case cannot well be called in question.

That the court possess such a power in cases of *torts*, except in one instance, wherein a new trial has never been granted, has been shewn, from the authorities read.

The principal obstacle that opposes itself to the exercise of the power arises from the difficulty that exists in ascertaining when a verdict is wrong, there being no mode of computation by which the damages can be estimated as in the case of contracts.

But even in cases of *torts* a gradation in injuries is very apparent. In an action for criminal conversation, owing to the enormity of the offence, the jury have been left without limits.

In actions for malicious prosecutions it is often the case that the plaintiff has run the risk of an ignominious punishment, and irreparable loss of character.

In slander, the defendant has maliciously endeavoured to fix a stain upon the plaintiff's reputation.

In an action for false imprisonment, the plaintiff has been deprived of his personal liberty.

1813.

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But trespass for goods taken, when unattended with aggravating circumstances to the dwelling or person of the owner, falls in the lowest grade of torts and gives the least foundation for augmenting the damages beyond the real injury.

In the case of *Bearman against Carrington* (a), which is one of the strongest cases in opposition to granting new trials for excessiveness of damages, it is said by the court, that there is a great difference between cases of damages which can be certainly seen, and such as are ideal; as between *assumpsit*, trespass for goods where the sum or value may be measured and in actions of imprisonment, malicious prosecution, slander and other personal torts, where the damages are matter of opinion. But in the case of *Goodtitle against Tombs*, (b) which was an action of trespass for mesne profits, the plaintiff was not confined to the very mesne profits only, but was allowed to recover for his trouble, &c.

In trespass for goods, in ordinary cases, the value of the goods ought not to be lost sight of; but even there it would not be unreasonable to allow the plaintiff something for his trouble and inconvenience. A trespass may be committed maliciously, with a design to harass and distress the plaintiff, consequently no line can be drawn with accuracy to estimate damages in case of trespass. It must be left to the jury upon the circumstances of each particular case, under the controlling power of the court, to grant a rehearing, upon sound and legal principles.

In a case circumstanced as the present, where the real value of the articles taken did not perhaps exceed from thirty to fifty dollars; where the dwelling house of the plaintiff was not invaded, or his family disturbed; where no affront was offered to his person by battery or menaces; where his character had not been scandalized or put in jeopardy, and where his liberty had undergone no restraint by imprisonment or otherwise; in such a case, the court cannot divest themselves of a firm belief that five thousand dollars dama-

(a) 2 Wilson's Rep. 248.

(b) 2 do. 121.

ges are excessive and very far disproportionate to the injury sustained. And from the extreme severity of the verdict the court must suppose that the jury have been misled, and have taken into their consideration circumstances well calculated to inflame their passions, but which formed a cause of action in favour of Jacob Shoemaker, and not of the plaintiff. The distress of the plaintiff's mother and sisters was sufficient to rouse his resentment, and had a tendency to provoke a personal attack ; yet it gave to him no legal cause of action, whereby he could derive any emolument to himself.

This view of the subject was not explained to the jury at the trial, which in all likelihood was a consequence of the *ex parte* hearing.

In torts, generally, the court would not grant a new trial merely because they were dissatisfied with the verdict ; we have no wish to control the Jury ; but in extraordinary cases it is our opinion, that an independent and discreet exercise of the controlling power of the court will aid in the attainment of justice, and will preserve, rather than impair, the sacredness of a Jury trial.

A Jury of the most honest and intelligent men, on a question of damages, may on a sudden be hurried into a severe and heavy verdict, which they themselves upon cool reflection would be desirous of mitigating. The court in exercising this power, do not invade the province of the jury.

The subject of controversy is merely referred back to the same tribunal, to be recommenced upon the most deliberate and calm consideration of a second Jury, whose verdict ought to be conclusive.*

The court decline making any recommendation as to the reduction of damages, to mark out the exact sum that the plaintiff shall recover, *that* constitutionally belongs to the jury and not to the court. The granting of a new trial keeps the two jurisdictions within their proper orbits.

* The cause was again tried the tenth day of September 1813, before a special jury, who gave a verdict for the plaintiff for \$ 1500 damages.

REPORTER.

1813.

SHOEMAKER
against
LIVEZELY.

1813.

SHOEMAKER
against
LIVELY.

The rule for granting a new trial is made absolute on the payment of costs. But the object is not to allow the defendant to take advantage of the manner in which the plaintiff has declared; he is to be confined to the merits.

New trial granted.

1813.

YOUNG against COLLINS.

7th June.

A legal prescription cannot exist in this state; but the doctrine of presumption prevails in a variety of cases.

It does not form an absolute, but a presumptive bar.

THIS was an amicable action, in case, entered the thirty-first of December, one thousand eight hundred and eight to try the right of the plaintiff and his tenants, as owner and occupiers of the house at the south west corner of Chesnut and Second-streets to the use of a certain privy, on an alley running north and south, at the east end of the house and lot occupied by the plaintiff.

The declaration complained, that whereas the plaintiff then was, and for a long time, then last past, had been possessed of the above premises, and that the plaintiff and all those whose estate he had in the land aforesaid, had had, and been used to have, a free passage to a certain privy, situate as above described, and the free right of using the same for themselves and their servants, to the privy aforesaid, going and returning, without any trouble, hindrance or denial of any person or persons: nevertheless the said defendant, contriving the plaintiff unjustly to vex, and him of his aforesaid rightful use of the said privy to deprive, on the thirtieth day of July A. D. one thousand eight hundred and eight, at the county aforesaid, certain rails and pieces of wood across the door of the said privy did place and fix, whereby the plaintiff, from having the use of the said privy in form aforesaid, was altogether hindered and deprived, to the damage of the plaintiff five hundred dollars.

The defendant pleaded, that the place where, &c. was the freehold of Isaac R. Marshall and others, at the time &c. and that the defendant was tenant for years, of the said Isaac

R. Marshall, et al, and that by command of the said Isaac R. Marshall, and the others, owners of the premises where, &c. he did place and fasten the rails and pieces of wood, &c. mentioned in the declaration, without that, that the said plaintiff and all those whose estate he had &c. have had &c. free passage &c. 1813.

YOUNG
against
COLLINS.

The cause was brought to trial before a special jury.

It appeared in evidence, that the easement had been enjoyed for a period of sixty years and upwards, with every appearance of ownership and with the apparent acquiescence of those seized of the inheritance. After the evidence was given at the trial, a verdict was agreed to be entered for the plaintiff for six cents damages, subject to the opinion of the court, whether in such a case the jury ought to presume a grant.

By the COURT, HEMPHILL, *President*.

We have examined the principles of law on the subject, and are of opinion, that after so long a possession, which has not been answered or in any way explained, the jury ought to presume a grant. A legal prescription cannot exist in this state, the memory of man being reckoned from a period of such remote antiquity, but the doctrine of presumption prevails in a variety of instances, it does not form an *absolute* bar like the statute of limitation, but a *presumptive* bar, which ought to go to the jury. In this case the land could not have been recovered if there had been an adverse possession for one third of the period in which the easement has been peaceably enjoyed.

Judgment for the plaintiff.

Lowber and Hopkinson, for plaintiff.

Alherton and Levy, for defendant.

CASES

IN THE

District Court

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

SEPTEMBER TERM, 1813.

1813.

A man, by his will, gave his executors power to sell as much of his remaining lands as should be sufficient to pay his debts. Instead of selling an arrangement was made between the executors and the residuary devisees, by which each devisee was to have his part, upon paying his proportion of the debts.

The Court were of opinion that the debts remained a lien on the premises longer than seven years notwithstanding the 4th section of the act of the 4th of April 1797, and that a purchaser under any one of the devisees took it subject to that lien.

MILLER against STOUT.

CASE stated for the opinion of the Court.

On the fifth day of May, one thousand seven hundred and ninety-eight, Peter Hinkle made his will, and died about the sixteenth of May one thousand eight hundred and one.

After several devises of different parts of his real and personal estate, there is in his will, the following clause,—
 “I do hereby further fully empower and authorize my Executors, hereinafter named, or the survivor, or survivors of them, to sell and dispose of as much of my remaining land as shall be sufficient to pay my debts; and to grant, convey, and assure the same to the purchaser or purchasers, his, her or their assigns forever, in fee, and to seal, execute and acknowledge all such deeds, conveyances and assurances in the law, for the absolute sale of the same or any part thereof;” the money now in Court to be disposed of arises from a sale by the Executor of the “remaining lands,” alluded to in the above recited clause of the will.

William Stout, the defendant, the executor, married Margaret, one of the children of the testator, to whom he devised, in equal shares, so much of these “remaining lands,” as should be left, after the sale for the payment of his debts.

Instead of selling these lands devised for the payment of debts, arrangement was made between the executors and the

residuary devisees, by which the land was to be divided into five equal parts, and each devisee was to have a fifth part, upon paying a fifth part of the debts of the testator.

1813.

**MILLER
against
STOUT.**

In execution of this arrangement the five devisees conveyed the whole interest to one Henry Hinkle, who was to reconvey to them severally, as they respectively discharged the portion of debt allotted.

The deed to Henry Hinkle, bears date the twenty-eight day of July, one thousand eight hundred and three.

All the devisees, but William Stout, have paid their parts of the debt, and received their re-conveyances.

There is a deed prepared and executed by Henry Hinkle to William Stout, for his share of the land; but, it has never been delivered, as he has not paid his part of the debt: This deed bears date the twenty-second day of March, one thousand eight hundred and three.

The twenty-seventh of November one thousand eight hundred and two, William Stout and wife executed a mortgage of her part of the premises, to Joseph Miller to secure the payment of a bond for \$533 34.

The first of April one thousand eight hundred and three, William Stout executed, a bond to said Miller for 175l on which a judgment was entered on the nineteenth of March one thousand eight hundred and seven.

The twenty-third of November, one thousand eight hundred and eleven, William Stout and wife executed a mortgage to Miller of the premises, in question, (and others) to secure, not only the debt of 175l, but the former debt of \$533 34. Under the last mortgage the property has been sold, for about \$1500. The representative of the estate of Peter Hinkle, claim \$378 13 of this money, being William Stout's part of the debts of Peter Hinkle; charged upon her share of the real estate.

Joseph Miller claims the whole money, or so much of it as will fully satisfy his claim under the mortgages, bonds and judgments held by him against William Stout.

The above mentioned deed of the twenty-eighth of July, one thousand eight hundred and three, has not been recorded, nor is there any written evidence of the arrangement above

1813. stated. The defendant denies that he had notice or knowledge of any such arrangement.

MILLER
against
STOUT.

Wallace, for plaintiff. *John Sergeant*, for defendant.

PER CURIAM, *Hemphill*, President.

It was contended, in this case, that the debts of the testators did not remain a lien on his real estate, longer than seven years; and to support this position, the fourth section of the Act of the fourth of April A. D. one thousand seven hundred and ninety-seven was relied upon.

The Court are of opinion that the above section does not extinguish the liens which, in the present case, were created by a particular provision of the will, making a part of the real estate of the testator (devised to certain devisees) liable for his debts, and authorizing his executors to sell as much of the same as would be sufficient for that purpose. A purchaser under any one of the devisees, must take it subject to this provision in the will; neither could a sale, made by the devisees, prevent the executors from selling, to pay the debts, and there is nothing to restrain the executors from selling, after the expiration of seven years.

In addition to this, it appears that the first mortgage, dated about sixteen months after the testators death, has an express reference to the will of Peter Hinkle. The mortgagee is therefore to be considered as having had actual notice of the existence of debts at the testators death, and of the executor's authority to sell.

If the Mortgagee did not know of the arrangement alluded to in the case stated, on that subject, it is enough to say, that the lien was not thereby affected; the land was still considered as a security for the debts; and besides, the first mortgage was given previously to the arrangement or lien of the twenty-third of July one thousand eight hundred and five. This mortgage is for a sum greater than the amount claimed for the debts and the security of the sum due on this mortgage, it is conceived, cannot be changed for the better by being included in the mortgage of November one thousand eight hundred and eleven; especially as the Mortgagee had derived notice from the will, when the first mortgage

was given, of the existence of debts and of the executor's authority to sell. It is unnecessary to say whether or not the sum of 175*l*, secured by Judgment on the nineteenth of March, one thousand eight hundred and seven, and afterwards included in the mortgage of the twenty-third of November one thousand eight hundred and eleven, stands in a light more favorable to the mortgagee, as there is money sufficient to pay that sum and the claim for debts, leaving something also towards satisfying the sum originally secured by the first mortgage.

Upon the whole, the Court are of opinion that the amount claimed for the debts of the testator ought to be paid; the mortgagee will be entitled to whatever remains.

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MILLER
against
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1813.

THE CASE OF JOHN THOMPSON.

November 13*th*

JOHN THOMPSON commenced building a house situate in the City of Philadelphia, in the month of July one thousand eight hundred and eleven.

Henry Bell furnished lumber to the building between the fifth day of August one thousand eight hundred and eleven, and the thirty-first day of March one thousand eight hundred and twelve, to the amount of \$929 67.

Bunting and Watson furnished lumber to the building between the eighteenth day of October one thousand eight hundred and eleven and the twenty-second of April one thousand eight hundred and twelve, to the amount of \$299 89.

On the tenth day of December one thousand eight hundred and eleven, Thompson executed to Paul Beck, jun. a mortgage on the lot on which the building was erected for \$600, which was recorded on the same day.

On the twenty-fourth day of March one thousand eight hundred and twelve, Thompson executed to Paul Beck, jr.

It was held, that the taking of the bond and warrant of attorney was not, nor was the entering the same, an extinguishment of the lien, created by the act of Assembly. But that A's lien had a preference over that of a general judgment creditor, whose judgment bore a date prior to the judgment of A, but subsequent to the commencement of the building.

A, having furnished materials used in the erection of a building, accepted a bond and warrant of Attorney from his debtor, the owner of the building; judgment was confessed on the Bond and warrant, and the lien was filed in the prothonotary's office within six months from the time of furnishing the materials. The building was sold within two years from its com-

1813. another mortgage on the same lot for \$1000, which was recorded the same day.

The Case of
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THOMPSON.

On the fourteenth day of May one thousand eight hundred and twelve, Henry Bell accepted from Thompson a Bond and warrant of attorney for the amount of his claim. He, on the same day, entered up the Bond and warrant and filed his claim in the office of the prothonotary.

On the same day Thompson gave Bunting and Watson a bond and warrant of attorney, for the amount of their claim; this bond and warrant was entered up, and Bunting and Watson's claim filed on the fifteenth day of May one thousand eight hundred and twelve.

The premises were sold on the twenty-third day of March one thousand eight hundred and thirteen, by virtue of a *venditioni exponas* for dollars, and the proceeds being brought into court a question arose as to the distribution of it.

The COURT, HEMPHILL, *President*, after argument, gave the following opinion.

This is a case between lien creditors, under the Act of the seventeenth of March one thousand eight hundred and six and a Mortgagee.

The building was commenced in July one thousand eight hundred and eleven.

Henry Bell had a claim of \$929 67, for lumber furnished from the fifth of August, one thousand eight hundred and eleven, to the thirty-first of March one thousand eight hundred and twelve.

On the fourteenth of May one thousand eight hundred and twelve, Henry Bell took a Bond and Warrant of Attorney to confess judgment from John Thompson the debtor, and owner of the building, and on the same day he entered judgment, by virtue of the warrant of attorney, in the District Court, and at the same time, filed his claim.

Bunting and Watson had a claim of \$299 89, for lumber furnished from the eighteenth of October one thousand eight hundred and eleven, to the twenty-second of April one thousand eight hundred and twelve; they also took a bond

and warrant of Attorney, to confess judgment, from the said John Thompson, on the fourteenth day of May one thousand eight hundred and twelve, and on the fifteenth day of May, had judgment entered in the District Court, and at the same time filed their claim. 1813.

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On the tenth of December one thousand eight hundred and eleven, John Thompson executed a mortgage, on the lot on which the building was erecting, in favour of Paul Beck, jr. for \$600, which was recorded on the day it was executed.

Another mortgage was executed by John Thompson on the same premises in favour of Paul Beck jr. for \$1000, on the twenty-fourth of March, one thousand eight hundred and twelve, which was recorded on the same day.

The premises were sold on the twenty-third of March, one thousand eight hundred and thirteen, by the sheriff, on a writ of *Venditioni Exponas*. The day of sale was within two years from the commencement of the building.

The act, after creating the lien in favour of the mechanics, provided that no such debt for work and materials shall remain a lien on the said houses, or other buildings, longer than two years from the commencement of the building thereof; unless an action for the recovery of the same be instituted, or the claims filed, within six months after performing the work or furnishing the materials, in the office of the Prothonotary of the said county.

In this case the bonds and warrants of attornies were taken and the claims filed, within six months, after the performance of the work &c. By the second section of the act of the twenty-eight of March, one thousand eight hundred and eight, the lien creditor may elect to proceed by a personal action against the debtor, to recover his claim, according to the nature of the demand, or by a *scire facias* against the debtor and owner of the building; but if he elects, to proceed by *scire facias*, execution shall not issue, except against the building or buildings upon which the lien exists. One of the remedies pointed out by the Act is to obtain a judgment in a personal action; and the judgment would not only bind the

1818. particular land, on which the building is erected, but all other lands of the defendant.

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On behalf of the mortgagee it has been contended, that the lien creditors, by the acceptance of the bonds and warrants of attornies, lost the benefit of their liens under the act because, by the general principles of law, the taking of the bonds and warrants, operated as an extinguishment of the simple contract debts; and that the liens of course must cease; and, as the mortgage was prior to their judgments, although after the commencement of the building, the mortgagee was entitled to a preference out of the proceeds of the sale. This has led us to examine into the Law on the doctrine of extinguishments, and into the reason of the law. It is a general rule that the acceptance of a higher security, than the creditor had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this is an extinguishment of the simple contract debt; but the acceptance of a security of an *inferior* nature, or of a security of *equal* degree does *not* extinguish the first debt; as in the one case, if a bond is given in satisfaction of a judgment; and in the other where, an obligee has a second bond given to him for the first debt.

A judgment is a security of a higher nature than a bond; and, if a bond creditor obtains judgment on the bond, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment.

In every instance where the law works an extinguishment, the creditor has gained a higher security; the thing substituted is more beneficial to the creditor, than the thing originally contracted for.

In the case before us, the debts of the mechanics or lumber merchants, were originally simple contract debts, but, for the security of these debts, the act has created a *lien* on the building. So that the security which the creditors had, in relation to the *safety* of the debts, ranked with that of a judgment or mortgage. For two years the lien is to continue, without any act to be done by the creditors; and within those two years, all the dates, in this case, are included;

and the claims to perpetuate their liens, were filed within the two years, and within six months after the furnishing of the materials.

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THOMPSON.

In the one case the claims were filed on the same day on which the bonds and warrants were executed ; but it must have been after their actual execution, as the papers were all taken to the office at the same time. In the other case, the claim was filed the day after the bonds and warrants were executed, but at the same time of the entering of the judgment. The circumstance of filing the claims, is evidence that the creditors had no expectation that their liens had been impaired, and there is nothing in the case to show, that the debtor understood it differently. If then the liens are to be affected, it results not, from the actual understanding of parties, but flows from the general principles of law ; and upon these principles, considered in the abstract, we have already seen, that a judgment or bond will totally extinguish a simple contract debt. But owing to the peculiar nature of the debts in question, secured as they are by the act, a judgment, although it might be said to drown the simple contract debt, does not destroy the lien ; for it still remains, and will defeat a judgment, prior to the judgment of the lien creditors, if the first judgment was after the commencement of the building. This has not been denied, but it is argued, that the judgment must be on the original cause of action, and not on the bond ; the argument is, that although a judgment which is a higher security than a bond, will not destroy the lien, yet that a bond will ; because that was not the course pointed out by the act, for the creditor to pursue. But that a bond will extinguish the lien, and that a judgment will not, is inconsistent with the general principle of extinguishment, and shows, that the case before us does not fall within the general rule.

It is conceded, that a judgment confessed in an amicable action, upon the original cause of action, would not have affected the lien, and shall the lien, then, be destroyed if the parties attempt to accomplish the same object by means of a bond and warrant of attorney to confess judgment ? The

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bond, as it appears to us, was only to ascertain the debt, and not to supersede the lien; the lien was a higher security than the bond; and, although it might, in legal estimation, extinguish the simple contract debt, it did not destroy the lien. A bond, we think, could not have a greater effect, in this respect, than a judgment; and that the act could not have intended, that the lesser security should destroy the lien, and that the greater should not, unless there were circumstances demonstrating that such was the intention of the parties.

In the case of *Bantleon against Smith (a)*, it was ruled, that although a judgment was a higher security, than a covenant, it did not destroy the pre-existing lien for the rent. Some of the remarks of the CHIEF JUSTICE, in that case, may apply to the present "an action of debt, will not lie on
" a bond on which judgment has been obtained; because the
" bond debt is merged in the judgment, which is a debt of
" record; the obligee in the bond loses nothing by this, for
" although the bond is extinct, the debt is not:" and he says,
" that by virtue of the judgment, in the case then before the
" court, the rent is no longer a debt of specialty, on which
" an action of covenant will lie, but a debt of record; but
" the rent still exists; or, in other words, there still exists a
" debt, on account of the arrears of rent." So, in the case before us, there still exists a debt, on account of the lumber furnished.

In *2 Strange*,* it is laid down, that if a man, after an act of bankruptcy, gives a bond for a simple contract debt, it will not so far extinguish the simple contract debt, as to deprive the creditor of petitioning for a commission; which shews, that the bond does not, in all cases, take away a right that was previously attached to the simple contract debt.

The case of *Geyer against Smith (a)*, has been cited; wherein it is determined, that the taking of a bond, from the administrator, discharges the old debt of the intestate; and it becomes the proper debt of the administrator. It was ar-

(a) 2 Binney 152.
(b) 1 Dallas 347.

* 1042.

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gued, that this case was applicable, because there was a lien on the intestate's lands, for the old debt, which was discharged by the acceptance of the bond from the administrator; it was answered, that the court did not advert to the lien; but that the decision was founded upon English authorities, independently of that circumstance: And that appears to be the fact, from the cases relied upon; and nothing to the contrary can be inferred from any thing that was said either by the court or counsel. Besides, it is at least questionable, whether that case was decided merely upon the common principles of extinguishments. The administrator in such a case is not considered strictly in the character of a representative; or why should not the intestates estate be bound; nor in the light of a stranger, because the bond of a stranger, it is said, will not discharge the old debt. Executors or administrators, having assets, are bound, by virtue of their office, to pay the debts of the deceased; and if a creditor accept of a bond from the executor or administrator, it is not considered as a payment and discharge of the old debt, and a total change of the debtor. But, independently, of the common doctrine of extinguishments by the acceptance of a higher security, upon that doctrine, if a bond debtor gives a new bond, that does not discharge the old debt; it being only of equal degree. But it appears to be otherwise, if an executor or administrator, in such a case, should give a bond. (a)

Upon the whole, we think that the case of Geyer versus Smith ought not to influence our decision, in the case before us, although we give no express opinion upon what he have last said, in relation to it. Cases may occur which ought to depend upon their own circumstances, and the intention of the parties.

The Court are of opinion that Henry Bell and Bunting and Watson ought to be preferred to the mortgagee, and that they are entitled to take, by virtue of their liens under the act, and are not confined to the dates of their judgments.

(a) 1 Modern 225, Blythe v. Hill and Cowper 289.

1813.

THE CASE OF JOHN VANDEVENDER.

30 November.

A lot was let on ground rent; the lessee covenanted to build within a limited time when he was to receive a deed; if he did not perform the covenant, he was to pay the rent accruing in the mean time, and deliver up the possession of the lot, and the agreement was to be void.

The building was erected and the deed executed. After the articles of agreement, and before the commencement of the building, several judgments were obtained against the lessee which were preferred to the liens of the mechanics for work done and materials furnished in erecting the building. A similar agreement was made with another, who assigned his right to a third person; the assignee performed the conditions and received the deed. Judgments antecedent to the transfer and the commencement of the building were deferred to the liens of the mechanics.

On the fifth day of September 1811, an agreement was entered into between Thomas Biddle and John Vandevender in the following words:

“Memorandum of an agreement made the fifth day of September, A. D. 1811, between Thomas Biddle of the city of Philadelphia, merchant, of the one part, and John Vandevender of the Northern Liberties, of the said city, Smith, of the other part, *Witnesseth* that the said Thomas Biddle agrees to let to the said John Vandevender his heirs and assigns, a certain lot or piece of ground, situate on the south side of Coats street, in the said Northern Liberties, at a distance of one hundred and twenty six feet westward from the corner of the old York road, containing in front or breadth on said Coats street 20 feet, and in length or depth extending thence southward, “keeping the same breadth,” one hundred and twelve feet two inches and a half; bounded eastward by ground granted upon ground rent to Elijah Green, Southward by ground of the late Henry Weaver, westward by ground granted upon ground rent to Thomas Gallagher, and northward by Coats street aforesaid; upon ground rent at the rate of thirty six dollars per year, without any deduction for any taxes or charges whatever, in equal half yearly payments, on the first days of January and July, in each and every year; and the rent to commence on the first day of January next; and the said J. Vandevender agrees to take the said lot on the terms aforesaid: And further, the said John Vandevender doth hereby covenant and agree, to erect, at his own cost, a good substantial dwelling house, worth four hundred dollars, with a cellar under the same, walled with stone, on the said lot, within two years from the date hereof. But if the said John Vandevender shall not erect the above described house on the said lot in the time aforesaid, then he shall pay the rent which shall have accrued in the mean time, at the rate aforesaid, and shall peaceably and quietly yield up the said

lot on the first day of January next; and the said J. Vandevender agrees to take the said lot on the terms aforesaid: And further, the said John Vandevender doth hereby covenant and agree, to erect, at his own cost, a good substantial dwelling house, worth four hundred dollars, with a cellar under the same, walled with stone, on the said lot, within two years from the date hereof. But if the said John Vandevender shall not erect the above described house on the said lot in the time aforesaid, then he shall pay the rent which shall have accrued in the mean time, at the rate aforesaid, and shall peaceably and quietly yield up the said

“ lot to the said Thomas Biddle, and this agreement shall be
 “ void ; and the said Thomas Biddle doth covenant to execute
 “ and deliver to the said John Vandevender, a good and suffi-
 “ cient deed for the premises as soon as he shall build the
 “ house and comply with the terms aforesaid, and further the
 “ said Thomas Biddle doth covenant and agree to sell unto
 “ the said John Vandevender whenever he shall make a legal
 “ tender of six hundred dollars, lawful money, besides the
 “ rent already accrued, all his right and interest in the above
 “ described lot of ground.”

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The case of
 JOHN VANDER-
 VENDER.

(Signed) “THOMAS BIDDLE.
 JOHN VANDEVENDER.”

John Vandevender erected a house on this lot, (which, for the sake of distinction, was called the eastern lot) pursuant to his agreement, and on the 11th of September 1812, received a deed from Thomas Biddle.

The building was commenced between the 15th and 20th of March 1812.

On the same fifth day of September A. D. 1811, Thomas Biddle made another agreement with Thomas Gallagher to let him another lot, (which, for the sake of distinction, was called the western lot) upon terms similar in every respect to those contained in the first agreement.

On the 11th day of March 1812, and before any building Gallagher, for a valuable consideration, transferred all his interest in the second lot to John Vandevender, his heirs and assigns, he and they performing the covenants on behalf of the said Thomas to be done and performed.

John Vandevender built a house on this lot, also pursuant to agreement and on the said eleventh day of September 1812, received a deed therefor from the said Thomas Biddle. This building was commenced about the same time as the first above mentioned.

On the 26th day of December 1811, John Vandevender gave Sharp and Jones his bond and warrant of attorney, conditioned for the payment of \$ 796 60 ; upon which judgment was confessed the 31st day of the same month.

On the 31st day of December 1811, John Vandevender

1813. gave Henry Abbott a bond and warrant of Attorney, conditioned for the payment of \$ 316, on which judgment was entered the 22d of January 1812.

The case of
JOHN VANDEVENDER.

On the 9th of October 1812, John Vandevender gave his bond and warrant of attorney to James King jun. and Chandler Price, conditioned for the payment of \$ 251 26, on which judgment was entered the 22d day of October 1812.

Thomas Smith, George Whitman, Benjamin A. Taylor, Robert Wallace, and others, furnished materials used in the building and erecting the said buildings.

The property was sold the 5th of January 1813, by the sheriff, and purchased by Sharp and Jones for \$ 1500. The execution issued the 30th of November 1812.

A question arose as to the distribution of the proceeds of this sale, between the material-men and the general judgment creditors.

It was argued by *E. S. Sergeant, Ewing and John Read* for the judgment creditors and by *Bradford* for the lien creditors.

PER CURIAM, Hemphill, President.

An agreement, under seal, was entered into on the fifth day of September 1811, between Thomas Biddle of the city of Philadelphia, merchant, of the one part, and John Vandevender, of the Northern Liberties of the said city, Smith, of the other part. It witnessed, that the said Thomas Biddle agreed to let to the said John Vandevender, his heirs and assigns a certain lot or piece of ground, situate &c. upon ground rent, at the rate of thirty-six dollars per year, without any deduction for any taxes or charges whatsoever, in equal half yearly payments, on the first of January and July in each and every year; the rent to commence on the first day of January next. And the said John Vandevender agreed to take the said lot, on the terms aforesaid. And further the said John Vandevender did thereby covenant and agree, to erect at his own cost, a good substantial dwelling house, worth four hundred dollars, with a cellar under the same, walled with stone, on the said lot, within two years from the date thereof. But

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f the said John Vandevender should not erect the above described house on the said lot, in the time aforesaid, then, he should pay the rent, which should have accrued in the mean time, at the rate aforesaid, and should peaceably and quietly yield up the said lot, to the said Thomas Biddle, and the agreement should be void. And the said Thomas Biddle doth covenant to execute and deliver to the said John Vandevender a good and sufficient deed for the premises as soon as he should build the house and comply with the terms aforesaid.

John Vandevender erected a house on the lot, agreeably to the terms of the agreement, and received a deed for the same, from Thomas Biddle, bearing date the 11th of September 1812.

Upon the aforesaid fifth day of September 1811, another agreement was entered into between the said Thomas Biddle and Thomas Gallagher, for another lot or piece of ground, situate &c. This last agreement was similar in all respects to the first.

On the 11th of March 1812, and before any building was erected, Thomas Gallagher, for a valuable consideration, transferred by an agreement under seal, all his right and interest in the last mentioned lot, to the aforesaid John Vandevender, his heirs and assigns; he undertaking to comply with the terms contained in the agreement between Biddle and Gallagher, which he accordingly did, and received a deed from Thomas Biddle for the second lot, on the aforesaid 11th September 1812.

After the articles of agreement, and before the commencement of the buildings, on either of the lots, several Judgments were obtained against John Vandevender; but these judgments were *antecedent* to the transfer of the second lot. Both lots were sold by virtue of process under one of these judgments. The general judgment creditors claim the proceeds of the sales, in opposition to the claims of the mechanics and others, who found materials and performed work for and in the erecting and constructing of the buildings.

Upon the above case, so far as respects the first lot, let the argument be construed as it may, the Court are of opi-

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nion, that John Vandevender had an *interest* in the lot, which was capable of being bound by the judgments. In the case of *Carkhuff v. Anderson* (a) it is laid down, that a judgment, in Pennsylvania, is a lien on every kind of equitable interest in land; that it is a lien on every kind of right vested in the debtor at the time of the judgment. The judgments in this case were not entered subsequently to the commencement of the building, yet it was urged, on the argument, that in the performance of the condition a lien was created in favour of the mechanics, which ought to have a preference over the judgment creditors. In regard to this, it is first to be observed, that the mechanics were under no obligation to perform the condition; that was an act to be done by John Vandevender; and how (it may be asked) was it in his power to perform the condition, and at the same time prevent his judgment creditors from reaping the advantage of it by the legal operation of their judgments?

The only plausible reason assigned, was, that in the first instance, there was but an *equitable* interest in John Vandevender; and that the judgments were liens on that equitable interest, only, until after the performance of the condition, by the erection of the building; and that, so far as respects the claims of the mechanics, the judgments might be said to originate *subsequent* to the commencement of the building, as they did not attach on the *legal estate* until *after* that period. This argument is founded upon the supposition, that a lien created by a judgment, can originate at different periods, to answer different objects. If the same course of reasoning is pursued, it might be said to apply to an *absolute* estate; and that a judgment could not attach upon a building, before its existence; and therefore, as to the claims of the mechanics might be considered as originating *after* the commencement of the building. But the reasoning when carried to this extent is refuted in the case of *Lysle v. Ducomb*, (b) when applied to a mortgage; and even when it is confined to the distinction between an equitable and legal interest, it seems too

(a) 3 Binney 9.

(b) 5 Binney 585.

to be adopted. At present, it appears to the Court, 1813.

legal contemplation, the lien created by a judgment on
in which the debtor is interested at the time the judg-
ment is rendered, can originate *but once*; and that the liens
originated, in this case, the instant the judgments were obtain-
ed, and operated afterwards upon the accumulated value of
the defendant's interest in the land, by their general effect;
but on this point it is unnecessary to express a more decided
opinion than we have done, in consequence of the opinion en-
tertained by the Court on the construction of the agreement
itself.

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It appears to the Court, that the condition contained in
the agreement was not a condition *precedent*, but a condition
subsequent, upon the non-performance of which, the legal es-
tate, which vested by the terms of the agreement, was to be
defeated; and that John Vandevender had a *legal*, and not
an *equitable* estate only, at the time the building was erected.
The words of the agreement are, that "Thomas Biddle
"agrees to let to John Vandevender, his heirs and assigns, the
"the lot in question, upon ground rent, at the rate of \$ 36
"per year, &c." "and the said John Vandevender agrees to
"take the lot on the terms aforesaid." John Vandevender
further covenants, "to erect a house of a certain description,
"within two years; but if he should not erect the house with-
"in the time, then that he shall peaceably and quietly yield
"up the said lot to the said Thomas Biddle, and then the
"agreement to be void."

If the agreement had been made without the covenant to
build, John Vandevender would undoubtedly have been vest-
ed of a fee simple, subject to the ground rent; the words are
sufficient to carry the legal estate. There is no covenant that
Thomas Biddle will thereafter let and convey; he is merely
to give a good and sufficient deed as soon as the house is
built. The covenant to sell the lot on the tender of \$ 600
is differently worded.

It happens, sometimes, that articles of agreement con-
tain words amply sufficient to pass the legal estate, although
there is a covenant to make a formal deed. In this case John

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Vandevender had the possession and erected the building within the time. The deed gave him no additional estate, and could be of no other use to him, except that it would operate as an acknowledgment, on the part of the grantor, that the condition had been performed.

The mechanics had a fair opportunity of making themselves acquainted with the prior judgments. They were matters of record, and if they did not choose to trust to the personal responsibility of their employer, they might have secured themselves in some other way, or have declined the undertaking.

The Court direct the money arising out of the sale of the first, or *eastern* lot, to be paid to the judgment creditors.

The case of Calhoun v. Snider, which has lately been decided by the Supreme Court, settles the law as to judgments binding, *after acquired property*. The judgment of itself gives no lien. In that case the after purchased land was aliened *before* execution issued, and it was determined, that it was *not* bound.

In this case, the *western* lot was purchased, after such of the judgments as were prior to the commencement of the building; and the building was commenced between the 15th and 20th of March 1812, at which time no execution had issued. The execution did not issue until the 30th of November 1812; of course, the lien of the judgment creditors on this lot, originated *subsequently* to the commencement of the building, and must be postponed to the claims of the mechanics.

The Court direct, that the lien creditors take the proceeds of the *western* lot according to their respective liens.

1813.

October 30.

DUTILH against MILLER.

THIS was an action brought by Catherine M. Dutilh, Lewis Clapier, Augustin Bousquett, Leopold Nottmangle and Charles Graff, executors of Stephen Dutilh deceased, against Andrew Miller. The summons was returnable to March term 1813. The declaration was filed the thirtieth of March, and a judgment was signed the next day. A writ of enquiry was taken out returnable to June term 1813.

On the 25th of May 1813, *Henderson* appeared for the defendant and upon the following affidavit of the defendant, obtained a rule to shew cause why the writ of enquiry should not be set aside and the judgment opened.

Catharine M. Dutilh, Lewis Clapier,
Augustin Bousquett, Leopold Nott-
mangle and Charles Graff, executors
of Stephen Dutilh
against
Andrew Miller.

DISTRICT COURT,
City and County of
Philadelphia.
March 1813. No. 65.

The Court will not, after a regular judgment interfere, to give a defendant an opportunity of pleading the statute of limitations, upon a general affidavit of defence; but if he will upon oath, declare the nature of his defence, and swear that the sum claimed was actually paid, or in any way settled and accounted for, they will not restrict him from pleading the statute.

Andrew Miller, the defendant in the above action, being duly sworn doth depose and say, that he hath a just and legal defence to the demand of the above plaintiffs. And that he had no notice nor any knowledge of said suit being instituted against him until he received notice from the plaintiffs' attorney that a writ of enquiry of damages would be executed in said case on the 4th June 1813.

ANDREW MILLER.

Sworn to before me 22d May 1813,

MICHAEL KEPPELE, Aldm.

On the hearing of the rule, *Heyl* and *John Read* for the plaintiff, contended that the defendant had been guilty of laches; that the Court had a right to open the judgment upon terms, and that they would impose upon the defendant the term of not pleading the statute of limitations. To support

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these propositions, they cited and relied on Willet versus Atterton, (a) and Brown versus Sutter. (b)

Henderson, contra.

The COURT,

HEMPHILL, *President*, gave the following opinion.

This rule was opposed, unless the defendant should be restricted from pleading the statute of limitations, which was said to be the object for wishing the judgment to be opened.

The Court are aware of the modern English decisions on this subject, but they are of no authority here, and the case of Brown versus Sutter, (b) which was decided in the Common Pleas of Philadelphia county, remains undisturbed by any decision in the State, with which we are acquainted. There is, however, but a very short note of this case reported, and perhaps it did not undergo any discussion.

We have reflected on the subject since the argument and consider it as being entirely within the discretion of the Court, and that discretion, we think, ought to be exercised so as to effectuate, as nearly as possible, the justice of the case.

The plea of the statute of limitations is not necessarily unconscientious, and it lies only within the breasts of the parties to know whether it is honestly used or otherwise.

We therefore put it to the defendant to say, on oath, what is the particular nature of his defence, and if he swears that the money was actually paid, or in any way settled and accounted for, we will not restrict him from pleading the statute of limitations; but if he is willing to make a general affidavit of defence only, which may safely be done, merely on the ground of the statute, we are of opinion, that after a regular judgment, the Court ought not to interfere, to give him the advantage of the plea of the statute of limitations, which he has lost by his negligence in suffering judgment by default.

(a) W. Black. rep. 35.

(b) 1 Dall. rep. 259.

CHARLES *against* DELPUX.

1813.

30 November.

Catharine Charles instituted against Pierre Delpux an action of trespass *vi et armis*, for entering her house and detaining her daughter, Ann Bonnette Charles, and getting her with child.

The suit was commenced to June term 1811 by a *capias*, which was issued on the 25th day of March 1811.

The declaration was as follows,

“ Pierre Delpux late of the county aforesaid, yeoman, was attached to answer Catharine Charles, widow, of a plea, wherefore he the said Pierre, with force and arms, broke and entered the house of the said Catharine, in the city of Philadelphia, and county aforesaid, and then and there with force and arms, made an assault upon Bonnette, the daughter, and servant of the said Catharine, and got her with child, and other wrongs to the said Catharine, then and there did to her great damage and against the peace, &c. And whereupon the said Catharine, by Peter A. Browne, her attorney, complains for that the said Pierre, on the first day of September, in the year one thousand eight hundred and eleven, and on divers other days and times between that day and the day of commencing this suit, with force and arms, &c. broke and entered the house of the said Catharine, at the County aforesaid, and then and there with force and arms, &c. assaulted and ill treated Bonnette, the daughter and servant of the said Catharine, then and still being; and then and there debauched and carnally knew her, whereby the said Bonnette became pregnant and sick with child; by means whereof she the said Bonnette, for a long space of time, to wit, from the day and year first above mentioned hitherto, became and was unable to do and perform the necessary affairs and business of the said Catharine, so being her mother and mistress as aforesaid, and thereby she the said Catharine, during all that time, lost and was deprived of the service of her said daughter and servant, and of all the benefit and advantage which might and would otherwise have arisen and accrued to her from

In trespass the day laid in the declaration is immaterial provided it is previous to the bringing of the action.

If no day is laid, or an impossible day, it is cured by verdict. But if the day laid be after the bringing of the action, and be past at the time of the trial, the error will be fatal.

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“ such service, to wit, at the county aforesaid ; and also by
 “ means whereof the said Catharine was then and there for-
 “ ced and obliged to pay, lay out and expend, and hath ne-
 “ cessarily paid, laid out and expended divers sums of money,
 “ to wit, the sum of five hundred dollars in and about the
 “ nursing and taking care of the said Bonnette, her said daugh-
 “ ter and servant to wit, at the county aforesaid ; and other
 “ wrongs to the said Catharine then and there did, to the great
 “ damage of the said Catharine, to wit, ten thousand dollars,
 “ and against the peace, &c. and therefore she brings suit,
 “ &c.”

The defendant pleaded "not guilty."

The cause was tried on the 10th of March 1813, before a special jury who gave a verdict for the plaintiff for \$ 650 damages.

On motion of *C. J. Ingersoll* a rule was obtained to shew cause why the judgment should not be arrested, for the following reason :

“ The action was instituted the day of
“ March one thousand eight hundred and eleven. The decla-
“ ration filed the 2d day of August 1811. The complaint is
“ laid in the declaration; for that the defendant on the 1st day
“ September 1811, and on divers other days and times be-
“ tween that day and the day of the commencement of this
“ suit, &c.” “ The complaint therefore appears on the record
to have accrued after the institution of the action, and after
the filing of the declaration.”

It was argued on the 28th and 29th days of April 1813 by *C. J. Ingersoll* in support of the rule, and *J. R. Ingersoll* and *Browne* against it.

C. J. Ingersoll.

The objection is that the plaintiff has shown his cause of action to have commenced after the suit was brought, which is fatal. Such was the determination in the case of *Hanbury versus Ireland*, (a) which was a bill filed of Hillary term in

(a) Cro. Jac 618.

the 18th year of James, for a trespass and assault and battery of the plaintiff's servant, on the 20th January, 17th of James, whereby he lost his service for a long time, viz. from the said 20th of January, in the 17th of James, until the first day of March following, which was in the 18th year of James, which was after the suit was brought.

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So in the case of *Hambleton versus Veere*, (*) which was an action brought for enticing away an apprentice and for the loss of his service for the whole residue of the term of his apprenticeship, and general damages being assessed, the judgment was arrested, because it appeared that the term was unexpired. The same principles would be found to be established in the cases of *Brasfield versus Lee*, (a) and *Ward versus Rich*, (b) to which he would only add the case of *Kennedy versus Gordon*, (c) which he said was directly in point.

J. R. Ingersoll and *Browne* for the plaintiff contended.

1st. That the error had been cured by the statutes of Jeofailes.

2ndly. That it was cured by the verdict.

3rdly. The court had power to amend the declaration and would amend it.

1st. The error is cured by the statutes of Jeofailes.

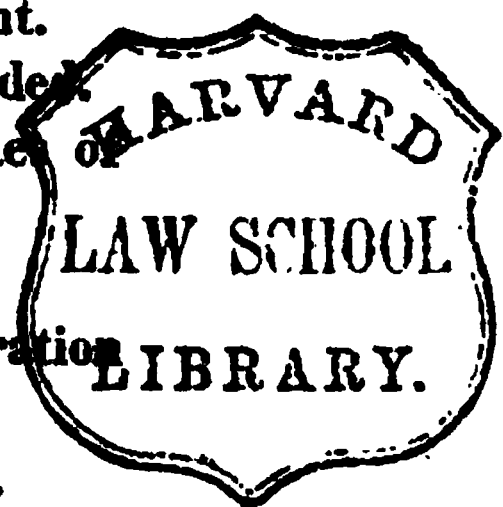
Prior to the time of Edward the first, courts were liberal in allowing amendments of errors in legal proceedings; but some judges having falsified the records to cover their own misdeeds, a statute was made to punish such offenders, and this statute was afterwards so rigorously and so indiscriminately put in execution by Edward, in the 17th year of his reign, that the judges became seriously alarmed, and, as Blackstone tells us, thro' fear of doing wrong, hesitated to do right. The reports of cases, decided immediately after that time, furnish abundant testimony of the predominance of form over substance. Every slip of the pen, the addition or omission of a word, a syllable, a letter, even a comma, was sufficient to bar the doors of the court against the appeals of

(*) 3 Saund. rep. 196.

(a) 1 Lord Raymond's rep. 329.

(b) 1 Vent. rep. 103.

(c) 2 Bin. Rep. 287.



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justice. From that disgraceful period to the present time, the Parliament of England have been endeavouring to remedy the evil; to wash away this original sin. Nor have the Legislature of Pennsylvania been idle. Courts of justice, by giving a liberal construction of the statutes of Jeofailes and amendments, must do their part towards the improvement of the law, or in this enlightened age it will lag behind the other sciences. By the statutes of 8th Henry, the 6th chap. 12, 32nd Henry, 8th chap. 30, the 18th of Eliz. chap. 14, and our act of Assembly, it was evidently intended to cure errors in form, whether occasioned by the parties, their attornies or the clerk of the court. Now in trespass the day is entirely matter of form. (*)

2ndly. It is cured by verdict.

It is an invariable rule that, with respect to motions in arrest of judgment upon matters of law, that the cause must have been good if it had been shown on demurrer. But the rule does not hold *e converso*; every thing which is good on demurrer will not arrest the judgment. (a) If the declaration or plea omits something which must have been proved at the trial, otherwise the party recovering, could not have had a verdict, this shall be cured by the verdict. (b) It is impossible that the plaintiff, in this case, could have recovered, without proving a trespass before the day the suit was brought. Blackhall versus Eccles (c) was a trespass said to be committed on a day not then come, and the court refused to arrest the judgment. In Keble's reports is a case much stronger than the present; (d) because it was assumpsit. The cause of action was laid on a day not then come; after verdict a motion was made to arrest the judgment, but the court said there should have been a special demurrer and it was good enough after verdict: And upon the authority of that case C. J.

(*) Co. Lit. 283, a. Bul. N. P. 86, 209. 1 Saunderson's rep. 24, a. N. 1. 12 Mod. rep. 92.

(a) Black. Com. 394.

(b) 1 Tidd's prac. 404. Com. Dig. tit. pleader. c. 87. 2 Vin. abt. 396, U. a. 10 Mod. rep 228, 300. Muston v. Yateman. 1 Bac. abt. 160. E.

(c) 12 Mod. Rep. 102.

(d) 3 Keble 354. Sorrel v. Lewin.

Parsons, in the case of Bemis v. Faxon, (a) refused to arrest a judgment where the promise was laid to be made after the test of the writ. To which might be added the case of Skinner versus Robinson, (b) which was slander, and judgment having been arrested, because the words were laid to have been spoken after suit brought, the High Court of Errors and Appeals reversed that judgment.

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The declaration would have been well enough without any date; (c) the date may therefore be rejected as surplusage.

3rdly. This is a mere slip of the pen, which the Court have the power to amend and will amend. Besides the power given by the statutes of amendments, (d) the court have a general power to amend in furtherance of Justice. (e) Courts of justice have, of late, been very liberal in allowing amendments. (f)

Amendments have been allowed in every stage of a cause, from the original to the execution, (g) and the court (h) have expressly declared, that they saw no difference in allowing amendments, whether the mistake had happened through the omission of an attorney or that of the clerk, as both were equally officers of the court.

With respect to the authorities cited in support of the rule, it will be found upon an examination, that they were cases, where in fact and in truth, the plaintiff's cause of action accrued after the suit brought, or entire damages had been re-

(a) 4 Mass. rep. 263.

(b) Browne's rep. 583.

(c) 2 Vin abt. 318; H. 19. ibid 399, 14. 12 Mod. 105.

(d) 14 Edwd. 3, ch. 6. 9 Hen. 5; c. 4 and 8 Hen. 6, c. 12 & 15.

(e) 1 Bac. abt. 154, Amend. D. 1 Bin. rep. 366. Benner v. Frey, ibid 486. Hills' Lee versus West.

(f) 1 Dall. rep. 133. Burrows v. Heysham, 2 do. 184. Fury v. Stone. 3 Johnson's N. Y. rep. 257. Harris versus Wadsworth. 4 do. 499. Chcetam v. Tillotson.

(g) 1 Dall. rep. 370. Elliot versus Elliot. 2 Dall. rep. 97. Cockshot versus Hopkins, ibid 143. Jones qui tam v. Ross, ibid 361. 4 Dall. rep. 25, Coruse versus Stead. 1 Johnson's N. Y. rep 150. Watson v. Delafield. 2 do. 295. Henryshoff v. Miller.

(h) 3 Johnson's N. Y. rep. 526. Close v. Gillispey.

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covered for a matter, which happened in part after the issuing of the writ; whereas in this case it is evident that the date in the declaration, is an error of the clerk, a mere slip of the pen, in a matter which is purely form.

PER CURIAM.

HEMPHILL, *President.*

This was an action of trespass, *vi et armis*, for breaking and entering the house of the plaintiff and assaulting and debauching her daughter, Bonnette, and getting her with child.

The declaration is entitled of *June* term 1811, and it is marked on the record that it was filed on the second day of August 1811.

The time of the cause of action is as follows: “For
 “that the said Pierre, on the *first day of September*, in the
 “year one thousand eight hundred and eleven, and on divers
 “other days and times, between that day and the day of the
 “commencement of this suit, with force and arms &c.

“By means whereof she the said Bonnette for a long
 “space of time, to wit, from the day and and year first above
 “mentioned, hitherto became and was unable to do and perform the necessary affairs and business &c. and the said
 “Catharine, during all that time lost and was deprived of
 “the service of her daughter and servant &c.

“And by means whereof she the said Catharine was forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended divers sums of money, to
 “wit, the sum of five hundred dollars, in and about the nursing and taking care of the said Bonnette, her said daughter
 “and servant.”

A motion has been made to arrest the judgment, because it appears from the record, that the cause of action accrued *after* the institution of the action.

The general principle is too plain to be controverted, that the cause of action must arise before the commencement of the suit, and if it appears otherwise, by the plaintiff's own shewing, the action cannot be supported; but it has been

contended, in this case, that the defect in the declaration has been cured by the verdict.

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against
DELPUX.

In trespass the day laid in the declaration is not material, provided it is previous to the bringing of the action ; and it appears from the cases cited, that if no day is laid, or an impossible day, which is considered as no day, the defect will be cured after verdict. The case of Bemis versus Faxon (a) was much relied upon, as a case bearing strong analogy to the present. In that case the dates on the face of the declaration are inconsistent with each other. The promise is alleged to be made at a day to come, but the breach is alleged to be committed afterwards on a day then past ; the whole weight of that case, so far as it bears upon the one before us, is derived from the respect paid by the court to the case of Sorrel versus Lewin ; (b) but it does not appear that even that case is similar to the present. It was an indebitatus assumpsit, "1 Jan. 26, Car. 2, which is not yet come." It was excepted, that here was no day, but it was allowed to be well enough *after verdict* : from the expression used, the day had not come at the time of the trial. The case of Blackall versus Eale in Carthew 389, appears to be a similar case ; there the day laid was not come *at the time of the trial*, and cured after verdict. The case of Blackhall versus Eccles, (c) is another case of the same description. The day laid in the declaration was not come *at the time of the trial*. The counsel for the plaintiff acknowledged, that if the time in the declaration had been *after the bill filed and before the trial*, the judgment must be arrested ; because then it would have appeared that the jury gave damages for an action arising since the suit commenced ; but, in that case, the time being *after trial*, it was as if there was no time ; and Sorrel versus Lewin was cited as being a similar case. In these cases the day laid *not being come* at the time of trial, was considered as no day, and it was presumed that a cause of action had been proved before the commencement of the suit. In the case before us

(a) 4 Mass. rep. 268,

(b) 3 Keb. 354.

(c) 12 Mod. 102.

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the day laid in the declaration *was past* at the time of the trial. The case of Skinner versus Robinson (a) was relied upon as a case in point for the plaintiff. The judgment of the court of Common Pleas having been reversed. We have seen the manuscript opinion of the Supreme Court on the reversal of this judgment, and it is by no means favourable to the plaintiff in this case. In the conclusion, it is stated that, *as to the real time of issuing the writ, that did not appear in the record and could not be enquired into by this court.* So that the point of law, decided by the Common Pleas, has not been disturbed, although the judgment was reversed. The court cannot well intend, in this case, that the jury have not given damages for a cause of action, arising after the commencement of the suit. The declaration states, that “the said Bonnette for a long space of time, to wit, from the day “and year first above mentioned, (which was a day after the “suit brought) *hitherto* became and was unable to do and perform the necessary affairs and business, &c.” “and the “said Catharine, during all that time, lost and was deprived “of the service of her daughter and servant &c.” “By means “whereof she had necessarily paid, laid out and expended divers sums of money, to wit, the sum of \$ 500, in and about “the nursing and taking care of the said Bonnette, her said “daughter and servant.” The whole cause of action is laid subsequent to the bringing of the action.

No case has gone so far as this ; here is no inconsistency of date appearing on the face of the declaration, nor impossible dates ; and the day laid was *past* at the time of the trial.

Our wishes incline us to support the verdict if we could, but we think it cannot be done upon legal principles.

The judgment must be arrested.

Judgment arrested.

(a) 1 Browne rep. 357.

LIVEZLY *against* PENNOCK.

1813.

13 November.

RULE to shew cause why the judgment should not be set aside.

In this case a judgment was entered by the party in this court by virtue of the 22nd section of the act of the 24th of February 1806.

A judgment had been previously entered in the same manner in the Court of Common Pleas of Delaware county, by virtue of the same bond and warrant of attorney.

The warrant is directed to William Lewis, attorney of the Supreme Court, or any other attorney in the said Court or any Court elsewhere; it authorises the attorney to appear in an action, then brought or to be brought, on the said obligation &c. and to confess judgment thereupon, for the sum of \$ 3000.

The question is, whether a judgment can be entered in different counties by virtue of the above bond and warrant.

BY THE COURT.

We never entertained any doubt on this subject, but held the case under advisement at the request of the plaintiff's attorney to make some enquiry as to what had been the practice. We have not been able to learn, that it has been the practice to enter judgments in different counties upon warrants similar to the present. If instances of the kind have occurred, they have been rare. It is said that where the warrant contains the words, "to confess judgment or judgments in any court or courts," it has been thought by some a sufficient authority to enter judgments in different counties; but we do not know that this has been recognized by any decision, and as the warrant, in this case, is differently worded, we need not express any opinion on that point.

To us it is very clear, that as soon as the judgment in this case was entered in Delaware county, the power contained in the warrant was fully complied with: the debt was then merged into a debt of a higher nature, and the judgment must be pursued, either by bringing an action of debt upon it in another county, or proceeding in the usual way by a *testamentum fi fa* or *ca sa*.

Judgment having been entered in the Common Pleas of Delaware county, by virtue of a bond and warrant of attorney which warrant was directed to Wm. Lewis esq. attorney of the Supreme Court, or any other attorney in the said Court or any Court elsewhere, &c. authorised the attorney to appear in an action then brought or to be brought on the said obligation &c. and to confess judgment thereupon for the sum of \$ 3000, the Court set aside a judgment subsequently entered thereon, in this Court.

1818.

LIVELY
against
FENNOCK.

If the authority goes further, it extends to every court in the State or perhaps in the Union, and costs must follow.

The pretension is 'so repugnant to principle that we should require an express decision or words in the warrant, evincing a plain understanding of parties, before we could give it our sanction.

We consider the prothonotary as only possessing the same power that was given to the attorney named in the warrant. He is by the act, merely substituted in the place of the attorney, to enter the judgment, and there is great reason why the warrant of attorney should be left in the office and filed, as the evidence of his authority to enter the judgment: And this would be impracticable if judgments could be entered in different counties, unless a copy of the record under the seal of the Court, would be deemed sufficient.

In this case, however, we do not ground our opinion upon any inconvenience that might arise in this respect; but upon the want of power, contained in the warrant, to enter two judgments.

Let the rule be made absolute.

CASES

IN THE

COURT OF OYER AND TERMINER,

AND GENERAL GAOL DELIVERY,

OF THE

COUNTY OF PHILADELPHIA.

JANUARY SESSION, 1814.

COMMONWEALTH *against* CLARK, et al.

THE persons summoned on the grand Jury, being called and empanelled, and the clerk being about to administer to them the oath, *Wilcocks, J. R. Ingersoll* and *Browne*, on behalf of *Asher Clark, Thomas M'Roy, John Moor* and *Henry Kelly*, who were confined in Jail on a charge of murder,* and against whom, it was understood, a bill of indictment was intended to be sent, at the present Session, claimed the benefit of challenging *Michael Freytag, Esquire*, who was returned, called and empanelled as one of the grand Jurors, for cause, viz. for having formed and expressed his opinion of the guilt of some of the prisoners.

A person accused of a crime may challenge any of the persons returned on the grand jury.

This right being contested by *Ingersoll, Attorney General*, assisted by *Edward Ingersoll*; the counsel for the prisoners proceeded to support their claim as follows.

Every Juror must be *liber homo*, by which must be understood, that he is not only a *free man* and not *bond*, but also one who has such *freedom of mind* as will enable him to stand indifferent, as he stands unsworn (a).

* The prisoners were all acquitted. (a) 1 Co. Lit. p. 155, a. sec. 234.

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WEALTH
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The goods, lands, fame and lives of men depend upon a fair trial by jury, and therefore it is most necessary that they be *omni exceptione majores* (a).

Challenges, are to the array or to the poll; challenges to the poll are either peremptory or for cause, and the latter, of which alone it is necessary, at present, to speak, are of four kinds; 1st, *propter honoris respectum*; 2dly, *propter defectum*; 3dly, *propter affectum* and 4thly, *propter delictum*.

Speaking of the third kind, Hawkins (b) says, it hath been allowed a good cause of challenge on the part of the prisoner, that the juror hath *declared his opinion* beforehand, that the party is guilty, or will be hanged, or the like.

In Cooke's case (c) TRENY C. J. expresses himself thus: "No Juror has a right to declare his opinion positively, until he has heard the evidence in the cause."

In Dent against the Hundred of Hertford (d), a new trial was granted, upon affidavit, that the foreman had declared, that the plaintiff should never have a verdict, whatever witnesses he produced.

It would be strange indeed if this exception should be good in a civil case, and was not equally available in a criminal prosecution, where liberty and even life may be in question. The authorities above cited shew, that it is applicable equally to both cases; and there is no less authority than Hawkins, for saying, that a person accused, has the same right to challenge the *grand jury* as the *petit jury*. He says, "Any person who is under a prosecution, for any crime whatever, may, by the common law, before he is indicted, challenge any of the persons returned on the *grand jury*, as being outlawed of felony &c. or villeins, or returned at the instance of the prosecutor, or not returned by the proper officer &c. (e).

(a) Ibid 156 a.

(b) Hawk. P. C. B 2. c. 43. Sec. 28.

(c) 4 St. Tr 748. 1 Salk. rep. 150. it was decided to be a good cause of challenge that the juror had said of a person to be tried for a crime, that he is guilty, or will be charged, &c.

(d) 2 Salk. rep 645.

(e) Hawk. P. C. B. 2, ch. 25, sec. 16. Vol. 4. p. 11 of Lond. ed. of 1795.

In the case of the United States v. Col. Burr, the right to challenge a *grand juror*, for favour was contended for by the counsel for the prisoner; the law was admitted by the District Attorney and confirmed by the court (a).

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The ATTORNEY GENERAL, and Edward Ingersoll, for the Commonwealth, admitted that the cause of challenge, upon being supported by evidence, was sufficient, provided the prisoners had a right to challenge a *grand juror* for *favour*; but denied the right to challenge a *grand juror*, for *favour*. The paragraph read from Hawkins, they said, was not full to the point before the court; for Hawkins, *enumerates* the causes of challenge to a *grand juror*, viz. as being outlawed for felony, or villeins, or returned at the instance of the prosecutor, or not returned by the proper officer, but does not mention the cause stated in the present instance, namely having prejudged the case.

In the case of Col. Burr the objection was *acquiesced in* by the District Attorney, without argument on his part; and the withdrawing of the jurors was *recommended* by the court.

In the only case where the point had come directly before the court the claim had been disallowed (b). The reason given is, that if objections of this nature were countenanced, the course of public justice would be greatly impeded.

For the prisoners, it was replied, that the cases mentioned by Hawkins were *instances* of the rule and not an *enumeration* of all the cases in which the right was to be exercised. Examine them and they will be found to belong to different classes of challenge. 1st "being outlawed for felony;" this is a principal cause of challenge, to the poll, *propter delictum*, 2dly "or villeins;" this is a principle cause of challenge, to the poll, *propter defectum*; 3dly "or returned at the instance of the prosecutor;" and 4thly not returned by a proper officer; These are principal causes of challenge, to the array.

(a) See p. 38 of the Trial of Col. Burr, reported by David Robertson Esq.

(b) 8 Mass. rep. 286. the case of John Tucker.

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Now if Hawkins is understood to enumerate all the cases where a challenge will avail against a grand Juror, doubtless some reason can be given why not only other classes of challenge, but numerous cases falling under the same classes with those he has mentioned, should be good causes of challenge to a *petit* juror and not good causes of challenge to the *grand* jurors. The reason of the law is the life of the law, and without some reason, the law in this case would be involved in absurdity. For instance; if a person has been *attainted* or *convicted* of felony it is as good a cause of challenge generally, as if he had been *outlawed* for felony; it ranks under the same head, viz; a principal cause of challenge, to the poll, *propter delictum*; yet Hawkins does not mention *attainder* or *conviction*; and therefore shall such a man sit on the grand jury?

So, if a man is an *alien*, which is a challenge *propter defectum patrie*, he should no more be a juror than a *villein*, the objection to whom is *propter defectum libertatis*; yet according to the doctrine contended for, we might have a whole grand jury of *aliens*, finding bills of indictment against *citizens*, for *treason*. As to the case of John Tucker, it was decided without much investigation or deliberation, and it is difficult to say to what length the decision is to be understood.

The note of the case is in these words. "The court will not set aside a grand juror, because he has been the *prosecutor* of a person accused of a capital crime, whose case may probably be brought before the grand jury."

If this was the decision of the court it is equally irreconcilable with the principles of justice and law. Shall the *prosecutor* sit in Judgment on the accused? Heaven forbid. What says my Lord Coke? So likewise one may be challenged, that he was the *indictor* of the plaintiff or defendant, either of treason, felony, misprision, trespass, or the like, in the same cause. (i)

(i) Co: Lit. 157. b.

Let us examine the case itself. The objection to Mr. Tucker was, "that he was a neighbour of the accused, living in the same town, had originated the complaint against him, and had, most probably, formed a strong opinion of his guilt." Being enquired of, by the court, if he had known or read of an objection of this kind being received to a grand juror, Mr. Story, referred to the case of Col. Burr, (which was not produced,) as a case where challenges had been made and allowed for *similar causes*.

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Upon examination it will be found that the only legal part of the objection against Tucker viz, that he was the *indictor* of the accused, was not urged against any of the Jurors returned in Col. Burr's case. The objection there made and allowed was, that the Jurors had respectively, *formed* and *expressed* an opinion upon the guilt of Mr. Burr.

"The court *recollected* the instance referred to," says the case; and yet they did not correct the error into which the learned counsel had fallen. But, "it was a solitary instance, so far as their knowledge of the books extended." With great submission to the knowledge of their honours, though they did not seem to be aware of the authorities of Hawkins &c. before referred to, it might be observed, that this was a very extraordinary objection. How many instances, it was asked, did it require to establish a principle of law? Did it require two, three, ten or an hundred? If it was an objection to the *first* precedent, that it was "*solitary*" there never could be a *second*. The decisions of courts are only the evidence of what is the law, and one would suppose, that when a principle of law was stated by learned counsel supported by authority, on the one side; admitted by the district attorney assisted by two able counsel on the other; and afterwards confirmed by the *Chief Justice* of the *United States* and the *Judge* of the *District* of *Virginia*, it would be considered as evidence too respectable to be shaken by a declaration, that it is a *solitary* instance; especially when that declaration was made without reading the case; without examining the authorities or reasons upon which it is founded. As to the reason. "If objections of this kind were received, the course of

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“public justice would be greatly impeded.” If the court here, and in their subsequent observations, refer to any part of Mr. Story’s objection, except, *that the juror was the prosecutor*, no one would disagree with them in opinion; but if they meant to answer that objection, it is denied that any such inconvenience exists; and if it does exist it is denied to be any cause for refusing a sacred privilege *in favorem vitæ*.

THE COURT, TILGHMAN, *Chief Justice*, and
BRECKENRIDGE, *Justice*, allowed the challenge.

Andrew Bayard and Edward George, two of the grand jurors returned on the panel, were appointed triors, who being sworn well and truly to try whether the said Michael Freytag stood indifferent between the Commonwealth and the prisoners, witnesses were called and examined by the prisoners’ counsel, and cross examined by the Attorney General, after which the triors returned their verdict, that the said Michael “was indifferent,” and he was sworn on the Grand Jury.

CASES

IN THE

DISTRICT COURT

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

MITCHEL *against* EVANS.

EVANS purchased of Mitchel a lot, and gave him a mortgage for the purchase money, dated the 13th of September, 1810, on the 19th of June, 1811, the mortgage was assigned to Mary Bell, and was recorded on the 28th of January, 1811.

The court would not give a preference over a claim under the act to secure mechanics and others concerned in the erection of houses, to a mortgage given before the commencement of the building, but not recorded within six months;

In the month of February, 1811, Richardson, a house-car-penter, was employed by Evans to erect a frame building for a theatre on the lot, and at different times during that month and the beginning of March, he superintended the purchase of materials, and on the 11th of March, 1811, actually began the building.

On the 19th of August, 1811, he filed a claim agreeably to the act of the 17th of March, 1806.

On the 1st of May, 1812, a scire facias issued on the mortgage, and judgment was taken by default on the 8th of June, 1812, and a Levari facias issued to September, 1812, on which the lot and building were sold.

PER CURIAM. HEMPHILL, President.

From the statement of this case it appears that when Richardson was first employed, and when he actually commenced the building, six months had not expired from the date of the mortgage, and that the mortgage was recorded before the claim was filed ; but all the dates mentioned includ-

1811.

MITCHELL
against
EVANS.

ing the time of sale were within two years from the commencement of the building, during which time a lien continues without any claim being filed.

The words of the act are, "That all and every dwelling
" house or other building hereafter constructed and erected
" within the city and county of Philadelphia, shall be subject
" to the payment of the debts contracted for or by reason of
" any work done or materials found in the erecting and con-
" structing such house or other building before any other lien
" which originated subsequent to the commencement of the
" said house or other building." Now it is clear in this case, that the lien created by the mortgage did not originate subsequent to the commencement of the building, it was an existing lien at that time. This case therefore is not embraced within the general words of the act; but as only two days of the six months remained unexpired at the commencement of the building, nearly, if not the whole of the carpenter's claim must have originated after the expiration of the six months.

A lien creditor ought to be favoured, because it is the object of the lien laws, to give him a security upon the specific thing.

In this case as the mortgagee did not record his mortgage, whereby the carpenter might have been made acquainted with his situation, he was guilty at least of negligence, and we think that upon a fair and equitable construction of the two acts, the mortgage ought not to be permitted to take the value of the building, which was not contemplated as a part of his security when he took the mortgage, but that the carpenter ought to have the advantage of his lien on the fund which was created by his labour and materials, he having had no notice of the mortgage.

In equity a mortgagee who has been careless is not favoured when his request stands in opposition to an innocent person, who may be considered in some measure as having been drawn into his situation by the inattention of the mortgagee. As if the first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor shewing a fair title, mortgages the premises to a second mortgagee to whom he delivers the

deeds, the second mortgagee will not be compelled to deliver up the title deeds unless his mortgage is paid off. (a)

In this case we do not meddle with the general question as to the liability of the lot. The mortgage being a lien that did not originate subsequent to the commencement of the building. Our decision is founded upon the peculiar circumstances of the case, and particularly on account of the mortgage not being recorded. It is considered as a new case, and that the mortgage ceased being a lien after the six months, at least so far as respected the building, as to which the carpenter is considered as *quasi* mortgagee, without notice with a lien for two years.

The court direct the value of the building to be paid to the lien creditors.

1844.

MITCHELL
against
EVANS,

PARKER against FARR.

A FOREIGN attachment was issued to September Term 1804, by Achilles Parker against William Williams and F. Baynold, in which William Farr was made the garnishee. Judgment was entered at the third term, and a scire facias was issued against Farr, but he died intestate, before trial or judgment. The administrators, Elizabeth Farr and Noah Simmons, were substituted as defendants; but a non suit was afterwards suffered. The present scire facias against the administrators was afterwards brought. The administrators pleaded that there were no goods in the hands of the garnishee at the time the attachment was served or afterwards; and on the trial the jury found for the plaintiff as follows: "One hundred and seventy seven dollars damages being the amount of the debt due from William Farr at the time of his death". The defendants had also pleaded a want of assets; but, on the trial, the question of assets was left open, by consent of the parties.

No bail was demanded of the garnishee, nor were any interrogatories filed, for him to answer, as allowed by the act of

(a) 3 P Wms. 279

N

A debt was attached by virtue of a foreign attachment, and the garnishee dying intestate, and his estate being insufficient to satisfy all his creditors, it was held, that the plaintiff had no preference over the other creditors:

1811. Assembly of the 28th of September, 1789. It was admitted that there were assets sufficient to discharge the damages found by the jury; but there were not enough to satisfy all the debts of the garnishee.

PARKER
against
FARR.

The question submitted for the decision of the court was, whether the foreign attachment creditor had a preference over the other creditors of William Farr, or was to be paid out of the assets according to the directions of the act of the 19th of April, 1794, which points out the order for paying the debts of an intestate?

It was argued by *Shoemaker* for the plaintiff, and *Todd* for the defendant.

PER CURIAM, HEMPHILL, President.

The court give no opinion on the case where the jury find specific articles to have been in the hands of the garnishee; there may be a distinction between such a case and the present, where the jury have found that a debt was due from the garnishee to the defendant in the attachment. In the case of specific articles being attached they could not be said to belong to the garnishee, and it would therefore be unreasonable that they should be appropriated towards the payment of his debts.

Difficulties may occur on this head where no security has been demanded of the garnishee, and the sheriff has not taken the articles into his custody, to abide the judgment of the court. But from the nature of the thing a debt cannot be taken into custody by the sheriff. The attaching creditor has a lien on the debt, so far as to restrain the garnishee from paying it over to the original creditor, but no further. A foreign attachment creates no lien on the real or personal estate of the garnishee. He is at liberty to dispose of either, clear of any incumbrance on that account. If the defendant in the foreign attachment enters special bail, and dissolves the attachment, then the garnishee may pay him; but if special bail is not entered, the garnishee is obliged to pay the person to whom the law, by its process, transfers the debt. But in case of the intestacy of the garnishee, why should this particular debt be

exempted from the operation of the act of the 19th of April, 1794? How does the attachment creditor acquire a greater interest, in this respect, over this debt, than the defendant in the attachment would have had if no attachment had been issued, or, if an attachment having been issued, had been dissolved by the entry of special bail. It appears to the court that satisfactory answers cannot be given to these questions.

1811.

PARKER
against
FARR.

The instant a garnishee dies intestate, the rights of all his creditors intervene, and their rights are protected by the positive language of the act of assembly.

The general creditors have no fund to look to but the estate of the intestate; whereas the attaching creditor may perhaps get the remainder of his debt from the defendant in the attachment.

The construction the court have put upon the acts of assembly relating to the subject, is most consonant to reason and equity, and they have not been able to discover any decision to the contrary, or any principle of the foreign attachment laws that mitigates against their opinion.

Religious Society of Roman Catholics against HITCHCOCK.

GRAVER and EAGER v. SAME.

ON the 28th of May, 1813, the sheriff, by virtue of a *fi ri facias*, for costs, at the suit of the Religious Society of Roman Catholics, levied on personal property of the defendants. No further proceedings took place under that execution until the 24th of August in the same year, when the property was sold, but did not produce sufficient to pay the rent and the amount of this execution.

The second *fi ri facias*, at the suit of Graver and Eager, was placed in the sheriff's hands on the 26th of July, 1813. On the 13th the sheriff made a levy on the same property, subject to the prior levy.

The Sheriff having made a levy by virtue of a *fi fa* for costs, delayed further proceedings thereon until after the return day, when another *fi fa* against the same person, being placed in his hands, he levied on the same property, subject to the prior Levy. The first execution was preferred.

The question submitted to the court was, to which of the executions the proceeds of the sale should be applied.

1811. It was argued by Delany for Graver and Eager, and Milnor
 ----- on the other side.

GRAVER
 and
 EAGER
 against
 HITCHCOCK

The Court gave the following opinion :

The second execution was levied subject to the former levy, and the sale was made in favour of the first execution. There were no instructions from the first execution creditor to stay the proceedings ; nor was the delay so long as to justify an inference that it was consented to. No presumption of fraud can therefore be drawn.

The sheriff cannot make a levy after the return of the writ ; but, when a levy is made, before the return day, he may complete the execution of the *fieri facias* by a sale, after the return day. The seizure vests the property in the sheriff so far as to enable him to maintain trespass or trover. Although the sheriff did not, in this case, actually remove the goods, before the return of the first execution, still he had a right to sell under it, and give a preference ; otherwise he would be personally liable to the first execution creditor. The delay, under the circumstances, was not sufficient to create a legal presumption of fraud. The first execution was for costs only, and it was in proof that the defendant wished the sheriff to wait until the bill of costs could be taxed when he promised payment. The delay of the sheriff is thus accounted for.

DISTRICT COURT
OF THE
UNITED STATES,

IN AND FOR THE
PENNSYLVANIA DISTRICT.

POWELL, et al. vs. SHIP BETSY.

1813.
10 January.

*To the honorable Richard Peters, judge of the District Court,
of the United States, in and for the Pennsylvania District.*

THE libel of William Powell, Charles Flexon, John Harris and George Middleton, late seamen of the ship Betsy of Philadelphia, Guier and Diehl and others owners and John Risbrough, master, respectfully sets forth :

That your libellants shipped at the port of Philadelphia, on the twenty ninth day of August, one thousand eight hundred and ten, on board the said ship Betsy, to perform a voyage from the said port, to Keihl, in Denmark, for which said port the said ship sailed from the said port of Philadelphia, on the thirteenth day of August. Your libellants being on board the said ship, the said ship proceeding on the said voyage, was captured by a French privateer and carried into Dieppe, in France, where she arrived on the nineteenth day of October, in the year aforesaid. From the time of the arrival of the said ship as aforesaid, until the fifteenth of May, one thousand eight hundred and twelve, your libellants remained by order of the captain, at Dieppe, with the said ship, and during which time, no condemnation of the said ship took place ; and on the said fifteenth day of May, in the said year, your libellants were ordered to leave the said ship, no provision for their

An American vessel was captured on her outward passage and carried into France. The seamen remained some time by the vessel, at the expence of the U. States and then with the Captain's consent returned to the United States. The vessel and cargo were condemned but afterwards restored. The judge decreed wages up to the time the condemnation was made known to the Libellants. The additional claim from that period to the time they left the vessel, was held for further proof.

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SHIP BETSY.

support being made or provided; and with the consent of the said captain, they left the said ship and embarked for the United States. Your libellants respectfully say, that there is due to them, from the said owners and master of the said ship, a considerable amount of wages, the same to be allowed to them accordingly, to the rate per month, at which they severally shipped, up to the said fifteenth day of May, in the year one thousand eight hundred and twelve, a particular account of which said wages, will be found in a certain schedule hereunto annexed and which they pray may be taken as a part of this their libel; and your libellants further respectfully represent, that they have been informed and verily believe that since their return as aforesaid to the United States, the said ship Betsy and her cargo or the proceeds thereof, have been restored to and have come into the possession of her said owners or their agents, or that a decree for the restoration, has been made by the government of France. Your libellants therefore pray that the said master and owners of the said ship Betsy, may be required to inform this Honorable Court, on their respective oaths or affirmations, whether the said ship Betsy has been at any time and when condemned as forfeited, and they have thus been deprived of the same; and also, whether the said ship Betsy and her cargo, have been restored or ordered to be restored to the said owners and when the said order for her restoration was made, and if the same have come into the possession of the said owners or their agents, and whether they are in possession of any and what information relative thereto.

And your libellants further pray, that this Honorable Court will order such further proceedings in this case, as may seem just and proper, and that by a decree of this court, there may be adjudged to them, their respective wages according to the accounts stated and set forth in the schedule aforesaid.

And they will, &c.

(Signed)

PETERS AND DELANY.

Attornies for Libellants.

To the honorable Richard Peters, Judge of the District Court, 1813.
of the United States, for the District of Pennsylvania.

The answer of William Guier and Thomas Diehl of the
city of Philadelphia, Merchants, to the libel of William Pow-
ell, Charles Flexon, John Harris and George Middleton, re-
spectfully sheweth.

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et al. vs.
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That your respondents saving to themselves, all and all manner of benefit or advantage to be had from the manifold errors, uncertainties and imperfections, in the libellants said libel contained, for answer thereto, or to so much thereof as is material and necessary for them to answer unto, they answer and say:—That true it is, the libellants shipped as seamen on board the ship Betsy, at the time and in the manner, and sailed upon the voyage set forth in the said libel.

That at the time of said shipment and commencement of said voyage, the said ship was owned by the respondent and Jacob Sperry, F. W. Sperry and Elisha Kane. That true it is, that the said ship, whilst proceeding on her voyage, was captured by a French privateer and carried into Dieppe, in France, where she arrived as is stated in the said libel. That the respondents do not admit to be true, as stated in the libel of the libellants, but do deny, that the said libellants remained by order of the Captain at Dieppe, with the said ship, from the time of her arrival, to the fifteenth day of May, one thousand eight hundred and twelve; that during that time, no condemnation of said ship took place, and that on the fifteenth day of May in the said year, the libellants were ordered to leave the said ship, no provision for their support having been made or provided, and with the consent of the said captain left the said ship and embarked for the United States. But of these allegations the respondents pray, that the libellants may be directed by your honor, to make full and clear proof.

And further answering, the respondents answer and say, that as they have been repeatedly informed, and fully believe the said ship Betsy and her cargo have been condemned as forfeited and the owners deprived of the same. That said condemnation was approved by the French Emperor, on the 9th day of January, A. D. 1812, and the respondents do aver,

1813. that the said condemnation was made known to the libellants,
as they are informed and believe on or before the twenty
fourth day of January, one thousand eight hundred and
twelve.

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And further answering, the respondents answer and say, that all the information they have received and all the knowledge they possess, on the subject of a restoration of the said ship and cargo and of the proceedings to obtain the same, has been derived from letters received by them from John Diehl, the supercargo of said ship, of which letters true copies are hereunto annexed, and which they pray may be taken as a part of this, their answer. And your respondents do aver and say, that the libellants, are not entitled to have and receive the wages, demanded by their said libel, because they say, that by the capture aforesaid, the said wages are lost to the libellants; or if not wholly lost, that the right of the libellants to have and demand the said wages, or any part thereof, is according to the due course of admiralty law, and the practice of this honorable court by reason of the said capture, suspended until the said ship or the freight or earnings of said ship, is fully and effectually restored to the owners thereof; and that upon such restoration, whenever this honorable court shall adjudge or decree, that due proof thereof has been made, the said libellants would be entitled to their wages only to the time of the condemnation of said ship and their receiving notice thereof. And therefore the respondents pray that this honorable court will proceed no further, with respect to the residue of said libel, praying that the court will adjudge the said libellants, the wages demanded; and that the libel of the libellants may be dismissed with costs, &c.

(Signed)

THOMAS DIEHL,
for self and William Guier.

Chauncey Proctor,
for respondents.

Thomas Diehl, one of the respondents, being duly sworn saith, that the facts set forth in the foregoing answer, are to the best of his knowledge and belief true.

(Signed)

THOMAS DIEHL,

1813.

POWELL
et al. vs.
SHIP BETSY.

Sworn to in open Court,

November 26th 1813.

(Signed)

D. CALDWELL,

Clerk of the District Court.

Paris, 30th January, 1812.

Messrs Guier and Diehl.

GENTLEMEN,

Since mine of yesterday, I have obtained from the council of prizes, the enclosed certificate, by which you will perceive the villainous and absurd plea, made use of in the condemnation of the Betsy and cargo. I have not, nor do I believe that I shall be able to obtain a copy of the condemnation. I shall however do every thing in my power to procure it, but if I should not succeed, hope the enclosed certificate will be proof sufficient to enable you to recover from the underwriters. No news with regard to the subject of my letter of yesterday. Inclosed you have a copy of a letter from the director of the customs at Abbeville, to the receiver principal at Dieppe.

Yours, &c. &c. &c.

(Signed)

JOHN DIEHL.

Custom House

Imperial.

Abbeville, 12th February, 1812.

Sale of the Betsy.

The director of the customs,

To M. M. Lagrine, principal receiver at Dieppe,

Copy.

SIR,

The emperor has ordered that the proceeds of the sales of the Betsy, condemned by a decision of the 9th of January, shall not be paid to the captors, but shall be provisionally paid.

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present situation, and have some idea of taking off her upper deck, and rigging her into a brig, which will improve her sailing greatly, and render the chance of escaping much more probable. As I have reason to believe you are still interested in the ship, and as it is probable I shall be detained six months yet, expect your instructions, relative thereto: be particular to give your letters to some person who will put them in the post office, or they will most probably never come to hand. I have had proposals to fit the ship out as a privateer, which might probably be done by giving one half against the equipment. Your ideas on that subject. Relative to the segars, of your T. D. shall be obliged to sell them to the government and am fearful the price will not be very advantageous, as they are not fond of paying dear for any thing they buy. Notwithstanding the numerous arrivals from the United States, I am without a line from any of the owners for several months.

Yours, &c. &c.

(Signed)

JOHN DIEHL.

Inform Mr. Ralston and Nathans, that I shall be obliged to re-export their nankeens, as the government will not allow them to be sold in France, and that I shall do the best in my power for their interest.

Paris, 23d June 1813.

*Mr. Thomas Diehl.**Dr. Brother,*

Since my last to you, on the 16th April, which I forwarded by several different occasions, I have received from the treasurer of the custom house here, four hundred and ninety thousand francs, less one fifth, which is held as a guarantee for the exportation, conformably to the decree of restitution, the difference between which sum and the amount of sales, (say sixty eight thousand francs,) has been paid, without my knowledge or approbation, by the director of the marine at Dieppe, who was charged with the execution of the sale, for sundry expences, the legality of which, am about disputing, as I

cannot conceive that such a sum can be composed entirely of just charges. It is also my intention to prosecute the captors for the loss sustained on the 183 boxes of sugars, damaged by their neglect, and it is the opinion of my attorney that I shall recover, as the decree of restitution orders, that the cargo should be restored to me without depriving me of the right of prosecuting the captors for property destroyed.

The segars belonging to you and Mr. Kintzing, are not sold, nor have I it in my power to inform you what I shall be able to obtain for them, as I am not permitted to sell them, but to the government, who have not yet said what price they will allow me. With regard to the nankeens, I lately applied to the minister of commerce for permission to transport them into Switzerland by land, where I could have obtained six or seven Franes, but unfortunately it was refused me, and I am informed by the said minister, that they must be exported from the port of Dieppe by sea, what I shall do with them, I do not know.

In my letter to C. and D. on the 23d April, ult. (forwarded by six different occasions) I have requested instructions relative to the ship. As to dispatch her in her present situation, she would stand but little chance to arrive in the United States, and to rig her into a brig, would cost so much that I do not like to undertake it without the particular instructions of the owners, but which in my opinion, would be the best method that could be adopted, as the expence would not be more here than in the United States, and would render her in case of the continuation of the war with England a very valuable vessel.

It would be imprudent to make any shipment at this season of the year, and shall defer doing any thing to the ship for two months, in hopes of receiving the particular orders of proprietors.

I shall not commence my shipments until about the commencement of November, and for the government of those concerned, shall give the earliest information possible of my operations, on their account. Inclosed I send you the first of Mr. Archibald Woodruff's draft, dated 22d inst. on M.

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1813. **Ledowick Sharpes**, for four hundred dollars, which you will please to collect, and pay to Mrs. Diehl, or place it to the credit of my account with G. and D. or yourself, as circumstances may require.

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Yours, &c.

(Signed)

JOHN DIEHL.

P. S. Make every necessary communication to those interested in this affair.

Paris, 19th August 1813.

Mr. Thomas Diehl.

Dr. Brother,

Since my last to you on the 23d June, ult. I am sorry to be obliged to say that I have made but little progress toward the conclusion of my affairs here. I have not as yet taken possession of the ship or segars and nankeens, as in order to hold the captors responsible if possible, for the damage which the ship and cargo has sustained, by their fault it is necessary that surveyors should be appointed by the court, (before I take possession). Contrary to all reason and common sense, the tribunal at Dieppe, has refused to allow me a survey; this is however, not extraordinary as it is not so easy matter to obtain a judgment against privateersmen, when it is from privateersmen you are obliged to solicit that judgment. I have appealed to the court of Rowan, where I shall hear my fate in six or eight days. I shall regret much to be obliged to abandon this claim, inasmuch as I perceive more and more every day, that the voyage will end in a loss to those interested. Relative to the settlement made by the commissary of marine at Dieppe, in which he has, as I have already advised, passed expences to the amount of sixty eight thousand francs, I do not think it possible, but that I shall be able to obtain a deduction of at least thirty thousand francs, at all events, if I do not succeed, it shall not be for want of attention or exertion. By a letter from the minister of commerce, some days since, I am informed that the exportations, for the proceeds of the ship Betsy and cargo, must consist of one third in silks,

and the other two thirds of articles at my choice, which I shall endeavor to accomplish, by the first of November if possible, and it is my intention to make my exportations from Bordeaux or Nantz. If I can find suitable vessels, that is to say, fast sailing schooners, that will take freight and of which I shall give the earliest information possible.

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It is with pleasure I have learnt some time since, the arrival in the United States, of the Bellona, as she was the bearer of my first letter to you, after the restitution of the Betsy and cargo, and have for some time been expecting particular instructions relative to the ship. Permit me to observe that it appears to me very extraordinary that I have not received a line from you, since the 28th November, 1812; as I had written you several letters, the answers to which, are to me, of the greatest importance. In order to avoid any difficulty with Mr. George Smith, or his creditors, it would perhaps be well to cancel the policy which he underwrote on my commissions, even if you should be obliged to loose the premium.

Yours, &c. .

(Signed)

JOHN DIEHL.

P. S. Please to make every necessary communication to those interested, as have not written to the different concerns, nor shall I until it is necessary to advise them relative to insurance, as I have it not in my power to forward their respective accounts.

(Signed)

J. D.

To the honorable Richard Peters, judge of the district court of the United States in and for the Pennsylvania District.

THE replication of William Powell, Charles Flexon, John Harris, and George Middleton, to the answer of William Guier and Thomas Diehl, filed in this court to the matters stated, and set forth in the libel of your replicants, respectfully sets forth,

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That your replicants, William Powell, John Harris, Charles Flexon, and George Middleton, saving to themselves all benefits and advantages arising, or which may arise, to them from the contradictions and imperfections in the said answer so manifest do say, that although it may be truly alleged and set forth in the said answer, that the said ship Betsy and cargo were condemned by order of the tribunal of prizes in France, yet the said ship, and almost the whole of the cargo has since, by an order of the emperor of France, been directed to be restored, and the agents of the owners have in consequence of such order, actually received a greater portion of the said cargo, or the proceeds thereof, and may at any time receive the residue thereof, as well as the said ship. Your replicants, in support of this allegation, beg leave respectfully to refer to the answer of the said Guier and Diehl, and the papers thereto annexed.

And the said William Powell and others, in further reply to the matter set forth in the said answer, do aver and say, that it is truly alleged in the said libel filed by them in this honorable court, that they remained in Dieppe, in France waiting the restoration of the said ship, by order of the captain thereof, and they do further say that after the capture of the said ship, and her arrival at Dieppe, under the charge of her captors and before your replicants left the said ship, as stated in their libel, they severally and together made frequent application to the master of the said ship for his permission to return to the United States, which applications were always without success, and this as well as all the matters stated and set forth in the said libel, as well as in this replication, they are ready to make out to the satisfaction of your honor by proof.

Your replicants do therefore pray, that inasmuch as it is shewn and fully proved, by the answer of the said Guier and Diehl, that the said ship Betsy and her cargo, have been restored, and are either in the possession of the agents of the said respondents, the said Guier and Diehl, or may be taken into their possession at any time, that your honor will decree the payment of so much of the wages of your replicants as are

due to them up to the period, when notice of the condemnation of the said ship, was given to your replicants, as set forth in the said answer of the said Guier and Diehl, viz: The twenty fourth day of January, one thousand eight hundred and twelve, and as to the residue of their wages, they pray that on your replicants making the proof aforesaid, the payment of the same may be decreed to them

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And they will, &c.

(signed)

R. PETERS & W. DELANY,

Proctors.

PETERS, Judge.

The ship sailed from Philadelphia, after the libellants had shipped as mariners, on the 30th of August 1810, bound for Kiehl, in Denmark; she was captured by a French privateer and carried to Dieppe in France, where she arrived on the 19th October, ensuing. The libel states that they remained on board, by order of the captain, at Dieppe, until the 15th of May, 1812, during which time no condemnation took place; on the said 15th of May, they were ordered to leave the ship, no provision for their support having been made, and with the consent of the captain, embarked for the United States. They demand wages up to the time of their leaving the ship.

They allege that the ship and cargo, or their proceeds, were restored and came into possession of the owners, or their agent, and pray that the master and owners, may be required on oath, to inform the court,

1st. Whether the ship had been, and when condemned?

2d. Whether the ship and cargo had been restored? And when the order for the restoration was made?

The respondents agree in the facts of shipment, capture and carrying into Dieppe; but they deny that the libellants remained in and with the ship until the time stated, to wit: the 15th of May 1812, and pray that they may be directed to make full proof of this allegation.

They allege that the ship and cargo were condemned as forfeited, and the owners deprived thereof. This condem-

1813. nation they allege was made known to the libellants, as they are informed and believe on or before the 24th day of January, 1812.

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They annex true copies of letters from the supercargo, John Diehl, containing all the information they possess.

They further allege, that the wages were lost by condemnation, or at least their right of recovery, suspended until complete restoration, and even then the libellants, are only entitled to receive wages to the time of condemnation.

The libellants reply—That although it may be true that the ship and cargo had been condemned by order of the tribunal of prizes in France, yet the ship and almost the whole of the cargo, has since, by order of the emperor, been restored, and the agents of the owners have actually received the greater portion of the cargo, or its proceeds and may at any time receive the residue thereof, as well as the ship. For proof whereof, they refer to the answer of the respondents and the papers annexed thereto.

They persist in their allegation, that they remained at Dieppe, by order of the captain, waiting the restoration of the ship and that they made repeated applications to the master, for leave to return home, without success.

They finally pray that wages be paid up to the period when it appears by the respondents own shewing, that notice of the condemnation was given, to wit: the 24th of January, and that they may be permitted to make proof as to the residue and on such proof being made, the same may be decreed. &c.

By the letters from the supercargo, Diehl, it plainly appears that after many delays and difficulties, the ship and cargo or its proceeds, were directed to be restored, and that a sum equal to about four fifths of the proceeds of the cargo, has actually been paid into the hands of the supercargo. The residue is retained as a pledge that the proceeds of the colonial produce, shall be exported in the productions of France. The ship it also appears, might at any time be taken possession of by the supercargo. But he did not choose to take such possession, until certain arrangements, (in which he

found difficulties) were made to enable him to sue the captors for damages, so that there is no doubt in my mind, that so far as relates to the mariners, who are not concerned in the effect of any ultimate measures, the owners or their agents may choose for their own objects to adopt, the restoration of the ship and cargo, or the proceeds of the latter, are to be considered as complete to all legal intents.

I therefore have no hesitation in decreeing, that the wages, up to the 24th of January, 1812, be paid with costs.

The additional claim for wages to the 15th of May, 1812, must remain for further proof.

The seamen were bound to remain with the vessel until the first decree for condemnation, under their old contract, and there is no doubt of their having so remained. But I have always considered the first contract at an end, when the vessel is condemned in the tribunal of the first resort, because the voyage is then broken up by a misfortune, which subjects the seamen to loss of wages ; if restoration does not ultimately take place. The seamen are not bound to remain longer than the time of notice of the first decree, at the risk of further loss. But they may remain at the master's request, waiting for the issue of an appeal. This is under a new contract, entered into by both parties, and if the request to remain be general, that is without prescribing new terms, it must be understood, that their abidance is under the terms of the old contract. I need not therefore consume any time in shewing that proof of this new engagement must be as full as that, for the establishment of the first contract. In this new contract, as well as in the old one, every man's agreement is distinct ; tho' all are named in the same instrument.

I do not know that the admiralty law, is different in the principles of evidence, from the common law, which has borrowed without acknowledging its obligations, many of its best principles, from the civil codes of ancient nations. When I endeavoured to establish some rules, on the subject of admitting seamen to be witnesses for each other, I had no particular view to the creation of a difference, between the admiralty and common law principles in this regard ; yet the civil law

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requires two witnesses, in cases where the common law is satisfied with one. The practice of civil law courts, is indubitably most congenial with admiralty and maritime proceedings. On this account I shall think myself warranted in cases wherein I think it necessary for the objects of justice to adopt the civil law rule, though I have not generally attended to it.

In the admiralty decisions, page 211, vol. 1, the general principles I laid down on this subject, will appear. But I do not perceive in them, any thing, bearing particularly on this case. A seaman is produced, (not one joining in the libel) to prove the new, or supplemental engagement, by the captain of the Betsy, with the mariners, inducing their stay at Di-
eppé, after the condemnation. It is not proved, on the contrary, it is denied that this mariner was collusively omitted in the libel, for the purpose of giving evidence, or under an expectation of being served by those mentioned in the libel, when he shall sue for his wages. This could not be permitted; nor have I ever allowed mariners, joined together in a libel, to be witnesses for each other. At common law, persons joined in a suit, such as trespass, &c. for the purpose of excluding them as witnesses, have nevertheless been admitted. But seamen voluntarily connect themselves in a libel, and do not stand on the like ground. But where many enter into a contract, not joint, but several, as all ship's articles are, I see not that, one mariner, may not be a witness, to prove the contract of his ship-mate, when unconnected in a suit brought for the recovery of wages, according to the strict principles of law. I do not recollect the point having before this time, been made. In common law courts, suits are always separate, on the claims of the mariners, who have not the privilege there of joining in the same suit, which they enjoy in maritime courts. The Judges of common law courts, do not feel the embarrassments, of one who must decide, both on competency and credit. On the latter, the jury have the exclusive decision. I have therefore reluctantly admitted one mariner, in any case to prove the contract of another, tho' I believe it has been done. In Johnson's Reports, (New York)

Vol. 3d. 515, it is truly said by Chief Justice Kent, that 1813.

“where seamen having a common interest in the point in contest, are admitted as competent witnesses, the fact would no doubt, work strongly against the credit of their testimony.” Of this opinion, I have always been. Having to decide on their credit, I have avoided, rather than pointedly refused admitting their testimony; to save myself the pain of disregarding their allegations on oath, in cases (and they are too common) in which I deem them careless, or worse. I know not how to relieve myself, where points of this sort are pressed on me, (and counsel by so doing, may serve a turn, which may reverberate on themselves, in some future cases,) but by establishing a rule, that the civil law practice, of two witnesses, shall in the case in question, and others similar, be adopted; and I request that this may be considered as the practice here. I do not deem the interest of the seamen in the present case, so connected, as that some may not have separate circumstances attending their claims. Part of the original crew may be retained, and others discharged. Whatever the predominant interests may be, it is neither greater nor less, in this supplemental or protracted contract, than that which prevailed in the original agreement, or shipping articles; and I think that as it regards their contracts, their interests may be more correctly stiled similar, than common. I admit the seamen as competent, but I shall expect further testimony. For the satisfaction of my mind on the point of credit, no specific rule can be established in any case.

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I have considered the certificates of captain Risbrough, exhibited in this case, which strongly imply, that the seamen were retained by his consent, and at his request. It is scarcely probable that they would have remained, if he had discharged them and assisted in the means of their return, as he did when the minister of the United States, would no longer permit them to be supported at public expence. But there is no direct proof of this part of the case:

Charles Flexson is certified by captain Risbrough to “have waited the decision of the said ship, until the 6th of

1812. " May, 1812, when he was ordered by Joel Barlow, American minister in Paris, to embark for the United States, as
POWELL, " he could not be supported at the expense of the American
et al. vs. " government any longer. Dated at Dieppe, May 15th,
SHIP BETSAY. " 1812."

John Harris has a similar certificate.

George Middleton has also a like certificate.

I see no such paper relating to William Powell.

If the seamen were detained by the consent of the captain they should have been supported at the expense of the ship ; but it appears, as soon as their support by the government of the United States or its agents was withdrawn, the sailors were ordered to return. This creates an ambiguity in the certificates, and requires explanation, which either party may give.

RULES
FOR
REGULATING THE PRACTICE
OF THE
District Court
FOR THE CITY AND COUNTY OF PHILADELPHIA.

Attorney.

WHEN any person applies to be admitted an attorney of this court, he shall be directed to be examined: three gentlemen of the law shall be appointed by the court, for that purpose, who, in the presence of the president of the court, if he can attend, or in case of his absence, in the presence of two other of the judges, shall examine the person in the fullest manner, and unanimously certify to the court, in writing, that he is well qualified to practise, before he shall be admitted.

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February 1.

No person shall hereafter be admitted to practise as an attorney or counsellor at law in this court, unless he hath served a regular clerkship within this state, to some practising attorney or gentleman of the law, of known abilities, for the term of three years; or hath served such clerkship, partly in one of the neighbouring states of New Jersey, Delaware, or Maryland, and partly in this state, the last year of which service shall have been in this state.

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Provided however, that this part of the rule shall have no retrospect, as to such persons who have studied part of their time in other states than those above mentioned, and have begun their last year's studies in this state, prior to the making of this rule; nor until such person shall produce to the court a certificate from three gentlemen of the law, to be appointed by the court, for that purpose, that the said person hath undergone an examination by them, in the presence of the president or two other judges of this court, and hath satisfied them that he is well qualified to practise.

Provided always, that in case of a person applying to be admitted, who shall appear to have studied the law with assiduity, under the direction of some practising attorney or gentleman of the law in this state, for the term of two years after his arrival at the age of twenty-one years; or partly in one of the said neighbouring states, and partly in this state (the last year being in this state); and being a person of integrity, and certified in manner aforesaid to be well qualified, he shall be admitted.

And provided likewise, that attorneys at law, residing, practising and originally admitted in one of the said states of New Jersey, Delaware, or Maryland; and being persons of good character and known abilities, may be admitted at the discretion of the court: but no citizen or inhabitant of any other state shall be admitted, until he shall have resided within this state two years next preceding his application for admission; nor shall any alien or foreigner be admitted to practise as an attorney or counsellor in this court, until he shall have resided within the state four years, next before his application for admission, and have taken an oath of fidelity to this state.

Persons who have studied the law in this state, in some other county than Philadelphia, shall first be admitted in the county where they studied, before they can be admitted here, unless a satisfactory reason is shewn to the court for such non-admission: and notwithstanding such admission, they shall undergo the usual examination here, unless they have been likewise admitted in the supreme court.

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All agreements of attornies, touching the business of the court, shall be in writing, otherwise they will be considered as of no validity.

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No attorney of this or any other court, or sheriff's officer, bailiff, or other person concerned in the execution of process, shall be permitted or suffered to become special bail in any action or suit depending in this court, unless he shall obtain leave of the court.

Where three or more counsel are concerned on each side, one of the counsel maintaining the affirmative of the issue, shall open the case, state the facts and, if necessary, the principles of law on which the case is founded, call and examine the witnesses, and read the papers: One of the opposite counsel shall then open his case, and proceed in like manner: when the evidence is closed, one of the counsel on the affirmative side of the question shall sum up, going fully into the points in controversy, and reading all the authorities which he and his colleagues mean to produce.

The two opposite counsel shall then speak in succession.

The remaining counsel on the affirmative side shall then be heard in reply: the reply is to be confined to the points made by the opposite counsel, and to the enforcing those made by his colleague. All the counsel are to endeavour to avoid going over the same ground with the preceding colleagues.

When two counsel only are concerned on each side, the same course shall be adhered to, as nearly as may be.

Alternative speaking shall be wholly abolished.

Bail.

When attornies issue writs of *capias* against defendants from whom they do not require bail, they will mark their precepts with the words "no bail required," which the prothonotary must endorse on the writ; in which case the sheriff or his officer is to serve the defendant with a copy of the writ, as in cases of summonses; and the defendant, on such service, must subscribe a note with these or the like words; "I here-

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by empower the prothonotary to enter my appearance to this action," which subscription is to be attested by the officer who serves the writ; and in all cases where common bail is ordered by a judge, the like note to the prothonotary must be subscribed and attested by the officer.

The manner of giving notice to the plaintiff, to shew cause before a single judge, shall be by application to the judge himself, who will issue his citation for that purpose, appointing such time and place for the hearing, as he shall find convenient to himself and the parties concerned.

A rule to shew cause of action, and why the defendant shall not be discharged on common bail, must be moved for before the end of the first week of the term, to which the process is returnable; this rule is to extend to foreign attachments.

In all cases, where a positive affidavit of a real subsisting debt, shall be made by the plaintiff in the cause, or by a third person, whose knowledge and situation shall enable him to make such positive affidavit, it shall be so far conclusive, that no counter-affidavit shall be admitted; but the judge will, at his discretion, ask such further questions of the person making such affidavit, as shall be necessary to satisfy his conscience, as well to the cause of action, as to the quantum of the bail.

When an affidavit is not positive, but yet sufficient to convince the judge that there is a good cause of action, especially where it is founded on a bond, note, letter, or other papers, signed by the defendant, the judge may, at his discretion, hold the defendant to bail; and in cases where satisfaction cannot be otherwise obtained, counter-affidavits may be admitted; so nevertheless, that the merits of the cause be not any further enquired into, than shall be absolutely necessary to decide the question of bail.

The actions wherein bail is of course, or where discretionary, shall be regulated by the books of practice.

When the plaintiff himself is not present, and the evidence of the debt is brought from a foreign country, founded on any bonds, notes, bills of exchange, or other papers, executed,

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signed, or acknowledged by the defendant himself, if it shall appear that due proof hath been made of the execution, acknowledgment, or signature, before a lawful magistrate, or public officer, according to the forms of the country from whence they came; and certified under some known and public seal of that country, the judge, being satisfied that a good cause of action appears, may, at his discretion, hold the defendant to bail: but no affidavit of the plaintiff himself, or any other person, taken in such foreign country, to prove any demands or accounts not accompanied with such writings, executed, acknowledged, or signed by the defendant, and proved as aforesaid, shall be sufficient to hold the defendant to bail, although such affidavit be certified under any public seal or seals, unless it shall likewise appear in evidence to the judge, that the defendant hath acknowledged such demands or accounts to be just.

Where the plaintiff resides in some other of the United States of America, and is not present at the time of shewing cause of action, a positive affidavit of a subsisting debt being made before any judge, mayor, or chief magistrate, of the city, town or place where the plaintiff resides, and certified under the common or public seal of such city, town or place, shall be admitted to shew cause of action, and shall have the same force and effect as if made in this state, before a judge of the court.

The court, at their discretion, will hear supplemental affidavits.

The defendant shall have six weeks from the first day of the term, to which the writ is returnable, to enter special bail; and if not then entered, the bail bond may be sued.

If before the expiration of six weeks, special bail *de bene esse* shall be entered, of which the plaintiff shall not approve, he may, within twenty days after the expiration of the six weeks, give notice to the defendant, or his attorney, that he excepts to such bail; whereupon the defendant shall, within eight days after such notice, justify the bail before a judge of the court; giving the plaintiff or his attorney twenty-four hours notice of the time and place of such justification: If no

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special bail shall be entered within the said six weeks, but shall be entered before the commencement of the succeeding term, the plaintiff shall, within the first four days of that term, make his exceptions to the sufficiency of the bail, or it shall stand: But, if special bail shall not be entered before the succeeding term, no special bail shall be taken afterwards, without first giving notice to the plaintiff or his attorney, of the time and place of taking the bail, or obtaining the consent in writing, of the plaintiff or his attorney, to the sufficiency of the bail.

After taking an assignment of the bail bond, a plaintiff shall not have a rule to bring in the body of the defendant; but he may except to the same persons being received, as bail above, who were bail to the sheriff.

In cases of foreign attachment, no special bail shall be taken in order to dissolve the attachment, or discharge from bail, without first giving notice to the plaintiff or his attorney, of the time and place of taking such bail; that he may have an opportunity of excepting to the sufficiency thereof.

Attachment.

No order shall be made for the sale of property seized on a foreign attachment, unless the plaintiff, or some other person acquainted with the demand of the plaintiff, shall make affidavit that the debt or demand of the plaintiff is just.

Costs.

In cases where the plaintiff resides out of the state, in *quidam* actions, in suits on administration and office bonds, or when the plaintiff, after suit brought, has taken the benefit of the insolvent laws, the defendant, on motion and affidavit of a just defence against the whole demand, may have a rule, that the plaintiff give security for costs at or before some period to be appointed by the court, and for want of such security, the court, on motion, may order judgment of nonsuit to be entered.

Pleading.

In every case where the defendant's appearance is recorded (and special bail entered, if it is a suit where special bail is required) rules to declare and plead and for other pleadings may be entered in the prothonotary's office, at any time after the first day of the term to which the process issued is returnable, and on four weeks notice thereof in writing to the adverse party, or his, her, or their attorney on record, and upon failure to declare, plead or enter other pleadings accordingly, a judgment, in the nature of a judgment by default, or a *non pros* may be entered: which judgment or *non pros* may be opened, set aside, or taken off at the discretion of the court, when deemed necessary for the purposes of justice.

Rules to declare or plead may also be taken at the settlement of the docket, according to the usual practice, or upon particular application to the court.

The above rules are not to preclude the plaintiff or defendant, in special cases, from applying either to the court or a single judge, for enlarging the time to declare or plead, having first given reasonable notice in writing to the opposite party, or attorney, of the intended application.

Upon a plea or pleas being entered, the prothonotary shall, of course, put the cause to issue, and enter the proper replications and other pleadings, for that purpose; but, the act of the prothonotary, herein, shall not prejudice either of the parties. Each party shall have it in his power, to enter other pleadings, or demur, as they may deem most eligible; provided, to prevent surprise and secure a fair trial, they give reasonable notice thereof in writing, to the adverse party. The time of filing the declaration, pleas, replications and all other pleadings and papers, shall be distinctly marked in the prothonotary's docket.

No dilatory plea shall be received, unless the party offer-

1812. ing such plea, does, by affidavit, prove the truth thereof, or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true.

Unless a declaration be filed in twelve months from the first day of the term to which an action is brought, a *non pros* shall be entered by the prothonotary, as a matter of course, unless the parties otherwise agree by writing filed.

It having been the common practice to plead the general issue, with leave to give the special matter in evidence at the trial of the cause; or to justify; in order, for the future, that neither party may be taken by surprise, and that a fair opportunity may be afforded to encounter the evidence intended to be afforded under such pleas, the party who proposes to take the benefit of it, shall, at least ten days before the trial, give notice in writing to the other, what are the special facts, or matters, on which he will rely, and which he intends to urge in support of his action, or by way of defence or qualification: otherwise he shall give no other evidence than what is, by law, strictly admissible on a general issue plea, or what has been received on such plea; by solemn and settled adjudications; this rule shall not apply to cases of slander and assault and battery, unless demand is made in writing of the opposite party, of the special matter or nature of the justification.

When there have been mutual dealings between a plaintiff and defendant, and the defendant intends on the general issue to defalk his own account against the plaintiff's demand, or any part of it, he shall give notice thereof in writing at least ten days before the trial, and at the same time furnish him with a copy of the account which he intends to give in evidence and rely on; and if the plaintiff's action is not founded on a speciality or writing, he, in like manner, shall be obliged, on the defendant's request, at the same time, or on a reasonable notice, to give him a copy of his account and demand, so that there shall be an exchange of copies at the same time; otherwise, the defendant shall not be compelled to a trial by the plaintiff, or *vice versa*.

Whereas it has been adjudged in the supreme court, after solemn argument, that on a plea of payment to a bond or speciality, the defendant may on the trial, in avoidance of the deed,

give in evidence, that it was given without any, or a good consideration, or obtained by fraud, or by a suggestion of a falsehood or suppression of the truth; for the future it is ruled, that, in all such cases, the defendant, at least thirty days before the trial, shall give the plaintiff notice in writing, of the matter intended to be objected in avoidance of the same; or else he shall be precluded therefrom.

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Special Jury.

The prothonotary shall cause a list of special jurors in each cause set down for trial by special jury, to be delivered to the attorney on each side, at least fifteen days before the time appointed for trial; and he shall subjoin thereto a notice of the time and place of striking the same.

The notice of the prothonotary, mentioned in the preceding rule, shall be considered as entitling the plaintiff or defendant to strike the same *ex parte*, at the time appointed, without further notice, and no *venire* shall issue (except by mutual consent of plaintiff and defendant,) unless the jury be struck ten days before the return of such *venire*; provided, that the striking of a jury, is not to be considered as entitling either party to a trial, if not otherwise entitled.

Witnesses and Depositions.

Notwithstanding a rule of court has been obtained for taking depositions of witnesses, and that they shall be read in evidence at the trial of the cause, in case of the death, absence out of the state, or other legal inability of such witness to attend; yet, in case the witness is resident within this state, and within forty miles of the place of trial, the deposition shall not be read in evidence, unless the party offering it shall satisfy the court that a subpoena has been actually taken out (except in case the witness is out of the state), and that the witness has been duly subpoenaed, or could not be found, after reasonable pains taken for that purpose.

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A rule to take the depositions of ancient, infirm, and going witnesses, to be read in evidence on the usual terms, is of course, and may be entered by either party, stipulating a reasonable notice to the adversary: so of a rule for a commission to any of the United States, or to foreign parts: But the interrogatories must be filed in the clerk's office at the time, and written notice of this last rule, and of the names of the commissioners must be served on the adverse party, at least fifteen days before the commission issues, in order that he may file cross interrogatories, or nominate commissioners on his own part, if he shall deem it eligible.

Affidavit of Defence.

In all actions brought or hereafter to be brought in this court of debt or contract, the plaintiff shall be at liberty to direct judgment by default to be entered of course, in the prothonotary's office, at any time after the second Monday of the next succeeding term, to which the process issued, is returnable; unless the defendant, or some person for him or her, shall have made an affidavit, and previously filed the same in the prothonotary's office, stating that, to the best of his or her knowledge and belief, there is a just defence in whole or in part in the said cause; and if the defence be to part only, the defendant shall specify the sum which is not in dispute, and judgment shall be entered for so much as is or shall be thus acknowledged to be due to the plaintiff, with stay of execution agreeably to the provisions of the seventh section of the act of the 21st of March, 1806; and the trial shall proceed for the residue of the plaintiff's demand; provided always, that no judgment shall be entered by virtue of this rule, unless the plaintiff shall have filed a declaration on or before the third day of the term to which the process issued, is returnable.

Every judgment entered by default, by virtue of the above rule, or obtained after an inquisition to ascertain damages,

shall be subject to the like stay of execution mentioned in the preceding rule. *The two last rules to go into operation after the first day of June term.* 1812.

When any judgment shall be entered, in those cases mentioned in the 7th section of the act of the 21st of March, 1806, the plaintiff may issue his execution; but the defendant shall be at liberty the first six days of term time, after the execution levied, to move for a stay of execution agreeably to the aforesaid act, and that the execution may be set aside on payment of costs; but if the defendant shall have claimed in writing, his privilege of freehold, and filed the same in the prothonotary's office, before the execution issued, then, if the plaintiff issues execution, it must be at the risk of paying the costs of the execution, if afterwards the execution is set aside and a stay of execution allowed.

New Trial—Arrest of Judgment.

All motions for new trials, and reasons in arrest of judgment, in causes tried in this court, shall be made and offered within four days after the verdict, unless in causes tried within the last four days of the term; and in that case they must be made before the term ends; and the motion must be made as aforesaid, notwithstanding the points have been reserved; and whenever a non suit is ordered with leave to move to take it off, a motion to take the non suit off must be made within the times aforesaid.

No motion shall be made to set aside a judgment for irregularity, after a motion to open the judgment.

No motion shall be made for a new trial, after a motion in arrest of judgment.

On the hearing of any motion, or application, after a rule to shew cause has been granted, no affidavit shall be read unless notice has been given to the opposite party, that an opportunity may be afforded to cross-examine.

If a warrant of attorney to enter judgment, be above ten years old and under twenty, the court, in term time, or a

1812. judge, in the vacation, must be moved for leave to enter judgment; which motion must be grounded on an *affidavit* of the due execution of the warrant, that the money is unpaid and the party living: but if the warrant be above twenty years old, there must be a rule to shew cause, and that must be served on the party, if he is to be found within the state.

Of bringing Money into Court.

The same practice shall prevail in all cases of bringing money into court, as the *statute of the fourth and fifth of Ann. chap. 16*, prescribes; according to the usage, practice and construction under it, in the court of king's bench at Westminster, at the time of the late revolution.

The prothonotary shall receive for all sums of money paid into court, from the party paying in the same, at the rate of one *per cent.* for all sums of money not exceeding one hundred pounds; and at the rate of ten shillings in the hundred pounds for all monies exceeding that sum.

Arguments.

In all law arguments, on demurrers, reserved points, special verdicts, motions in arrest of judgment, or cases stated for the opinion of the court, the counsel for the plaintiff, and the counsel for the defendant, shall, each of them, deliver one paper book, or state of the points in controversy, as contended for, on their respective sides, to the court, or the president, at least two days before the argument: If either party neglect to do so, he shall not be heard, when the cause comes to be argued.

Upon rules to show cause of action, or to dissolve foreign attachments, the party who is to shew cause is to begin and conclude; in all other cases, the party who obtains the *rule to shew cause* is to begin and conclude.

Reports of Referees.

Reports of referees shall be read in open court, on the first Saturday of the term; and reasons for setting aside such reports shall be filed within four days afterwards, excluding Sundays, accompanied with affidavits, as to facts which do not appear upon the face of the proceedings: as to reports not read on that day, whether brought into court or not, filed in the office in term time or vacation, no executions are to issue thereon, 'till notice in writing is given to the opposite party; after which notice, such party is to have four days for filing reasons.

In all arguments on the report of referees, the party taking exceptions shall furnish the court with a copy thereof.

Arbitration.

In all cases of arbitration under the late act of assembly, if the party entering the rule shall not proceed in the same, so as to have the arbitrators chosen or appointed at the time specified therein, it shall be the duty of the prothonotary (unless otherwise agreed by the parties), to strike off the rule, in order that the cause may be restored to the trial list, or arbitrated by the opposite party, or otherwise proceeded in by the parties.

When either party excepts to the award of arbitrators, the exceptions must be filed, within twenty days after the award is entered in the office of the prothonotary, accompanied with affidavits as to facts, not appearing on the face of the proceedings.

Trial List, how to be made out.

The party or his attorney, shall, before the eighth day of February, 1812, furnish the prothonotary with a list of such causes as he may wish to be placed for trial, at

1812. March term; from which list, the prothonotary, within two weeks thereafter, shall make out the general and special trial lists according to the seniority of the causes. Two months previous to every succeeding term, the party or his attorney shall furnish the prothonotary with the names of such additional causes, as he may desire to be placed on the trial list for next term; and the prothonotary, within one week thereafter, shall make out the trial lists in the manner aforesaid, for the next term.

The court will, at such time as may, from experience, be deemed most expedient, make known that causes commenced before a particular period only, shall be taken up the first week; and a similar direction shall be made for each week of the term, it being understood that causes not reached in the week particularly allotted for them, shall be entitled to their preference at the succeeding weeks, in order, always to give the oldest causes an opportunity of being first tried.

If a cause is not put on the trial list after it is at issue, the defendant may move for a rule to try, or *non pros* at the next term; and whenever a cause is under a rule for trial or *non pros*, the defendant shall be entitled to the advantage of the rule, although the plaintiff has not put the same on the trial list.

All actions which are or shall be at issue, either in fact or law, and shall hereafter be left off the trial or argument list for one year afterwards, shall, of course, be marked by the prothonotary "not to be brought forward."

When any cause is reached on the trial list, at or after the fourth term, including that to which the action shall have been instituted, if the plaintiff does not *bring it on for trial*, or shew to the court a legal or satisfactory reason for continuing the cause, a rule for trial or *non pros*, shall be entered as a matter of course. This rule is not to go into operation until June term, 1812.

The above rules, except those before particularly excepted, to go into operation on the 8th of February, 1812.

The following is the case referred to, by the defendants counsel, in the case of Guier against Pearce, ante page 35.

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In the Circuit Court of the United States, in and for the Pennsylvania District.

READ *against* WILKINSON.

This action was founded, amongst other items of account, 1st. Upon a bill of exchange, drawn by the defendant on P. Noland, in February, 1790, in favor of the plaintiff, dated in Kentucky, and which was never protested; but Wilkinson was informed that it was not paid. He paid a part of it, for which a receipt was indorsed. He afterwards, by letter to the plaintiff, plainly intimated that he was to furnish the drawee with funds to pay the bill.

2ndly. Upon a bill drawn by General Moylan, of Philadelphia, on the defendant in Kentucky, in 1790, in favor of the plaintiff, and accepted, by indorsement, on the terms mentioned in a note to the drawer.

The plea principally relied upon, was the act of limitation; to which, the plaintiff replied, a new promise within six years before the action. To support the replication, the plaintiff relied on a letter addressed, by the defendant, to him, dated the 19th day of April, 1805, (this action having been entered in 1808) in which he states, that he had been prevented from forwarding his papers to Mr. Ingersoll for the final adjustment of the plaintiff's claim, but that he would immediately do so; and then added, that he should hold himself bound in honor and law, to abide his decision. On the 22d of the same month, he wrote to Mr. Ingersoll, and enclosed to him a sealed packet, containing his papers; and also an arbitration bond, executed by himself, submitting the dispute to his arbitration. He requested Mr. Ingersoll to obtain a similar bond from the plaintiff, and, on that event, to break the seal of the packet and proceed to the adjustment. But, if the bond was not given by the plaintiff, he (Mr. Ingersoll) was to return the packet with the seal unbroken. This letter was shewn

1812. to the plaintiff, who declined the arbitration. Wilkinson
came to Philadelphia in 1796, with his family, and remained
some months.

Washington Justice, charged the jury, that a promise to pay within the time prescribed by the act of limitation, had always been held to remove the bar, and to revive the *remedy*, which alone is defeated by the act of limitation. Although it had been once doubted, whether a bare acknowledgment of the debt was sufficient to revive the *remedy*, it was settled long before the revolution, and as he thought rightly; for, an acknowledgment of a debt for a valuable consideration, if not amounting to a promise, is at least *evidence* of it, sufficient to create a debt originally; and if so, it was certainly sufficient to revive the *remedy*, where that had been defeated by the act of limitation. The decisions in England, particularly of late years, had proceeded great lengths in construing slight expressions into a promise or acknowledgment. He could not say he should feel disposed to go as far; as the commerce of that country had increased, the courts had shewn great anxiety to remove bars against the payment of just debts, and had discountenanced, as much as possible, the plea of the act of limitations, which was once viewed with great favor. He was of opinion, that any offer on the part of the debtor, operating to remove the bar created by that act, should, upon a fair interpretation of the meaning of the party on all that he had said, amount either to a promise or to an acknowledgment of the debt, or of some debt. Thus, a promise to pay, if the creditor will prove his demand, is sufficient. A promise to account, though the debtor adds, that he owes nothing, may amount to a promise to pay, if it should appear upon the account, that any thing is due, for why account, if the debtor does not mean to pay what may be found due? But any thing which is added, tending to negative a promise or acknowledgment, must be considered as qualifying every other expression; and as the whole must be taken together, it amounts to a refusal to pay, which can never be construed into a promise to pay; as if the debtor should say he owed the debt, but would not pay it, and would take advantage of the act of limitation.

THE FOLLOWING, IS THE OPINION OF JUDGE RUSH, ALLUDED
TO IN PAGE 41.

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January 20.

TO understand the act, entitled, "An act to regulate Arbitrations, and proceedings in courts of Justice," it will be proper to consider the *general view* of the legislature, to ascertain the meaning of the different sections, to discover the relation to each other, and to adjust their influence and operation on the whole system.

This law is connected and involved from beginning to end—the roots and fibres of every section are so extended, and interwoven into all the other sections, that it is almost impossible to explain a single clause, without going into an exposition of every other part. It resembles a last will and testament, where it is often necessary to explore every word and sentence, to discover the meaning of a particular bequest.

The court feels a degree of solicitude, the result not less of duty than of inclination, to carry into complete effect, all the laws of our country. And whatever embarrassments may attend the execution of the law now in question, arising from its peculiar phraseology, and the novelty of its provisions, we shall endeavour to give it all the operation the legislature intended to give it, and which it is capable of receiving.

The legislature appear to have had two objects in view.

1st. To enable private persons to conduct their own causes in court, in certain cases, without the assistance of attorneys.

2d. To promote in court, in like manner, arbitrations and awards, without their intervention.

The latter position will be extremely evident, from the first, second, third, fourth, and eighth sections. By the first and second sections, voluntary references and awards, entered in the prothonotary's office, either in vacation or term time, are placed on the same footing, as if made by the *direct* authority of the court. And it is expressly declared, in those *two* sections, that the *parties themselves* may enter into references; even in cases where an action is *depending* between them, or an amicable suit has been entered in the protho-

1807. tary's office. The third section points out the *môde*, in which the referees are to proceed; and discountenances opposition to awards under the act, and to verdicts by juries, by inflicting the penalty of costs and the expenses of witnesses on the party, in the event of his *finally* and unsuccessfully impeaching the *merits* of either. To induce referees to accept the trust, the fourth section allows each of them a dollar a day; and in case of refusal to act, each referee is subjected to a penalty of two dollars. The eighth section empowers the *clerk* of the court, to enter an amicable suit, *without the agency of an attorney*; and on confession of the defendant in writing, signed by two witnesses, to enter *judgment* against him, with such stay of execution as may be agreed upon by the parties.

Pursuing the same idea, of excluding the agency of attorneys, and enabling the party to conduct his cause in court, *without* their assistance, the act has introduced for his use and benefit

1st. Forms of original process, in actions of debt.

2ndly. It has authorised him to file a statement of his demand, on the return of the process; and to do other acts, in the prosecution of his claim.

3dly. It has enabled him in all *civil suits*, or proceedings, to plead his own cause.

4thly. It hath prescribed a general form of execution.

We shall examine the law, with respect to each of those particulars; remarking also, whether any, and what alteration has been made in the forms of proceedings.

FIRST point. The act has provided forms of original process, solely for the use of the party, in actions of debt; and it should be remembered, that by far the greatest number of suits are of this description, brought for the recovery of money due on contracts. The tenth section, therefore, directs the *prothonotary*, on the application of the party, or his agent, to issue a precept in the forms there prescribed. The process to be issued on such application, is for any debt due by bond, note, book account, rent, damages, or assumption. At the end of this section, there is a proviso, which demonstrates, that these forms are only binding on the *officer*, when they are issued at the *request* of the party. The words are—"it

plaintiff to demand (that is, of 1807.
in either of the forms, against
debtor."

out by the party, in the forms
in the meaning of the law, the
court, on the parties, and on all

notary may issue process in any
link proper to direct.

that this section does not extend
or administrators are plaintiffs
is and the forms are restricted
as in their own right.

to enable the party to take out
form of process for his benefit,
further. They have therefore,
ment of such demand, which is

SECOND point. The first part of the fifth section is expressed in general terms—it enacts, that in all cases where a suit is brought for the recovery of any debt, founded on a verbal promise, book account, note, bond, penal or single bill, or all or any of them, and which from the amount thereof may not be cognizable before a justice, it shall be the duty of the plaintiff, *either by himself*, his agent, or attorney, to file in the office of the prothonotary, a statement of his demand, on or before the third day of the term, to which the process is returnable, particularly specifying the date of the promise, book account, note, bond, penal or single bill, or all or any of them, on which the demand is founded, and the whole amount of what he believes is justly due—and it shall be the duty of the defendant, at least twenty days before the next succeeding term to which the process issued is returnable, to file in the office aforesaid, *either by himself*, his agent, or attorney, a statement of his account, if he has any, against the plaintiff's demand, specifying what he believes to be due to the plaintiff. And it shall be the duty of the prothonotary to file, without the agency of an attorney, such statements.

1. What is a statement?

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2. Who are to file

The word *state* of classical authorities. The verb, *to state*, sent any thing, in a to represent facts a *a statement of a debt* an exhibition in writing the contract, such which the debt was mature evidently in *statement*, to specify which supposes the and that the *date* is essential part of the particularly specify would be repugnant would make it significant between the creditor the obvious meaning of the legislation particularly specify to be inserted.

A statement of the year 1806, particularly in the year 1806, particularly universally understood to include, not only a minute detail of the interesting circumstances of that memorable victory, but a recital also of the *military* events, which preceded and followed it.

But who are to file these statements? Are attorneys at law to file them? Or are they to be filed by the party himself only?

Notwithstanding the general terms of the fifth section above mentioned, we think, the filing a statement, was designed exclusively for the benefit of a person prosecuting his own cause, or action of debt, and is to be *restricted* to the act of the party.

At the close of the fifth section, which speaks of filing these statements, are these words—"And it shall be the duty of the prothonotary to file, *without* the agency of an attorney."

declares positively, that it shall be done, *without* the agency of C, surely C will be excluded from performing the act. It is well known, that in the construction of a statute, general words may be restrained and limited in their operation, by subsequent expressions.

In the twelfth section, on the return of the writ of ejectment, it is declared to be the duty of the plaintiff *either by himself*, his agent, or attorney, to file a declaration, describing the land he claims. Thus far the words are similar to those in the fifth section; but no further. It is not said, in the case of filing a declaration in ejectment, as it is in the case of filing a statement, that it shall be the duty of the officer, to file it *without* the agency of an attorney. The inference from these

pias or summons. In the case of filing a statement, the same liberty of adding up his debts of every kind, is allowed, when it appears *from the amount thereof* that it is not cognizable before a justice. The sameness of expression shows, that both were intended to be the *acts* of the party. To have enabled him to take out a writ to recover a debt, would have been altogether nugatory, if the law had not gone further, and authorised him to file a statement of the demand, of *equal extent* and efficacy. In fact it would have been worse than nugatory—it would be abandoning him, just after taking him over the threshold of the cause—it would be leaving him to grope his way through a labyrinth, the moment after he had been led into it.

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That the act never intended to substitute a statement instead of a declaration, except where the action of debt is brought by the party himself, may be inferred also, from the sixth section, which supposes a *declaration* or *statement* to be filed in *every* case, and speaks of these both, as exhibiting equally the cause of action, on the part of the *plaintiff*. This section enacts, that no suit shall be set aside, for informality, if the process be issued in the name of the commonwealth for monies owing or due, or for damages by trespass, or otherwise, as the case may be; and that the process was served on the defendant by the proper officer, and in due time—And that on the trial, the plaintiff shall not be nonsuited for informality in any *statement*, or *declaration* filed, or by reason of any informality in entering a plea; but when in the opinion of the court, such *informality* will affect the merits of the cause, the plaintiff shall be permitted to amend his *declaration* or *statement*, and the defendant may alter his plea of defence.

Those expressions were designed to aid equally a defective declaration, or statement—they are placed on the same footing; and if the statement be referred to the act of the party, and the declaration to the act of the attorney, the section will have its full operation. Those expressions show also, it was not intended to abolish *declarations* in *any* case; because the word *declaration* is used as synonymous with *statement*, and of course may be filed in *every* case. We can never believe the legislature meant to abolish *declarations* in actions of debt, where they are brought by an *attorney*; because they have not said so: nor that they designed to impose on him the double task, of filing both a declaration and statement; because it would be both nugatory and preposterous. Until therefore they shall direct in express terms, that there shall be no declaration filed by an attorney in actions of debt, we cannot think ourselves justified, upon an obscure passage, to overturn a practice founded on immemorial usage, dictated by the plainest principles of justice and propriety, and adopted by every civilized tribunal under the sun, which requires from its advocates, a correct, orderly, and intelligible narration of the material circumstances of the case on the part of the complainant.

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This section seems to have put an end to nonsuits on the trial of causes. Objections founded on *informality* are to be overruled; and if they affect the merits, longer time is to be allowed, that the pleadings may be corrected on both sides.

Although the *party* may obtain process, in the cases mentioned in the tenth section, and file a statement according to the fifth section, yet the *defendant* may avail himself of the benefit of counsel.

On the other hand, if an action of debt be brought by an attorney, the defendant may, *in person*, file a statement of an account against such demand.

In any case, where a statement is filed by the defendant, according to the fifth section, and the plaintiff does not recover more than the defendant confesses to be due in *his* statement, the plaintiff shall not recover costs subsequent to the offer to confess judgment.

The expression in the sixth section, that the plaintiff's attorney shall not be entitled to a judgment fee in *any action of debt*, shows the intention of the legislature to discountenance actions of debt being brought *by attornies*. In order that the business might fall into the hands of the *parties* themselves: the design seems to have been, to make it no longer an object with attornies, to commence actions of this description.—We are however, compelled to understand terms in their legal sense, until the legislature shall give them a different meaning. The phrase *action of debt* must therefore receive its technical construction, and cannot be extended to any other form of suit.

Upon the return of the process, *in the cases enumerated in the fifth section*, whether the action be brought by the party himself, or by attorney, the statement, or declaration, which soever it be, must be filed on or before the 3d day of the term. If the defence be matter of *account*, and the *party* himself appear, he must file his statement against the demand of the plaintiff, twenty days before the ensuing court.

The next stage of proceeding is the third day of the *second* court, when the actions, *described in the fifth section*, are all to be called over, that the parties may appear in person, or by their agents or attornies. Upon this day the act contemplates

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a mingled assembly of *citizens* to support their own claims and *statements*, and of attornies to support the claims and *declarations* of others. If the plaintiff neglects to appear on the third day, the court shall order a non-suit. In case he appears, and the defendant neglects to appear, the court must give judgment against the defendant for the sum due. If both appear, and the defendant refuses to confess judgment, the cause is then tried, or referred.

It would be to no purpose to enable the party to take out a writ in debt, to prescribe a form for his use, and to authorise him to file a *statement* of his demand, if the legislature had not gone further. They have, therefore, enabled him to plead his own cause in court, which is the

THIRD point we proposed to consider. It will be recollected that by the constitution, every man has a right to be heard, by himself, and his counsel, in *criminal* prosecutions, but that there existed no law which gave him the same right in *civil* cases. In conformity, therefore, to the plan, of opening the door of justice to the party, and more completely to carry into effect the design of the legislature, the ninth section has declared, that in all civil suits and proceedings in any court, every suitor shall have a right to be heard by himself, and his counsel, or either of them.

It would be to no purpose to enable the party to take out a writ, to prescribe a form for him, to authorise him to file a statement of his demand, and to plead his own cause at the bar of the court, if the legislature had not gone further. They have, therefore, given a general form of execution, and thereby enabled him to avail himself, ultimately, of the steps adopted by him in the previous stages of the cause—which is, the

FOURTH point we proposed to consider. The eleventh section has established a general form of execution, and declares, that *all executions* to be issued, shall be agreeably to that form, and not otherwise.

No form prescribed by the legislature can be judicially wrong. The party relying upon it will be always safe, so far as the form applies.

This form deprives the creditor of the right of taking in execution, the *person* of his debtor, in the first instance. It

1807. has also compelled the creditor, whatever may be his *feelings*, to issue process against the body of his debtor, on which he is liable to be imprisoned. In these particulars, the law has been altered. We may observe here, that the introduction into courts, of the same form of execution, and stay of execution, which have been heretofore made use of by justices of the peace, which has been done by the seventh section of this act, evinces the design of the legislature to aid the party to prosecute his cause, without the assistance of an attorney.

The words of the eleventh section—"where there is not sufficient *personal* estate to pay the debt and costs, the sheriff shall levy on the real estate of *the defendant*" show clearly the *debt* meant, is one due from the defendant in his *own* right. The legislature never designed to subvert every principle of justice, by obliging one man to pay the debt of another.

The person of an executor and administrator, and generally speaking, their property cannot be taken in execution, to pay the debts of the *deceased*. The form of execution will not apply in such cases, and *other* legal forms must be used.

The act intended to imprison those persons only who might be *legally* imprisoned, under the old law; and therefore the form does not apply in the case of an execution against an *insolvent* debtor, whose person is exempt from imprisonment.

There cannot be the least doubt, if the sheriff does not sell, on the execution, a *venditioni exponas* may afterwards issue. Property may remain in his hands for want of buyers, and from other causes. If the form prescribed is to be unchangeably adhered to, an *alias* itself can never issue, for then an *alteration* would be made, and inserted in the body of the writ. The expression, that the "Form of all executions to be issued, shall be as follows, and not otherwise," is intended to consolidate the different sorts of executions to *prevent expense*. But this form must always be taken out, in the first instance, in those cases where it applies.

The twelfth section introduces a new mode of commencing an ejectionment; and prescribes the form of the writ. "All

“ writs of ejectment shall be in the form following, and not otherwise,” are the words of the section. 1807.

Many questions and much litigation will probably arise on this part of the act.

The words of the writ suppose the defendant to be in *actual* possession. What if he appear and make defence? May he afterwards put the plaintiff to prove he is in possession, and non-suit him if he doth not prove it, or would a non-suit on this ground be refused under the sixth section of *this* act?

The words of the writ are—“ For a tract of land containing acres, or thereabouts:” and the act declares this shall be the form of the writ, and not otherwise. What if the claim be of a house, or part of a house? is the present, or the old form to be adopted?

The form of the writ supposes the defendant to be in *actual* possession. What if the claim be for empty houses, or land in possession of no person?

The words of the writ are—“ For a tract of land containing acres or thereabouts.” Is the plaintiff bound to designate the quantity of arable, woodland, and meadow, as formerly?

What if there be a verdict against the plaintiff on a case within the act? will he be afterwards entitled, as formerly, to bring a *second* ejectment?

The act says, when the plaintiff has filed his declaration, describing the land, the defendant shall enter his defence, in whole, or in part, and issue shall thereupon be joined.—In what manner is this issue to be joined?—Is the defendant to plead not guilty, as formerly, or is he to file a special plea, alleging the title is *not* in the plaintiff, but in himself, or a third person?

These, and many other questions, in the execution of this law, will certainly occur to the inquisitive eyes of professional men, on which we now give no opinion; the court in their examination of the act, having confined itself to those prominent points, that relate to the present moment, and are indispensably connected with its immediate execution.

ON the argument of the rule to shew cause, in Redwood against Consequa, (ante) the following case was relied on by the plaintiff's counsel, who read the opinion of judge Washington, from that valuable Treatise on Foreign Attachments, for which the profession are indebted to Thomas Sergeant, Esq.; the arguments of counsel, and the opinion of judge Peters, were afterwards introduced by Charles Jared Ingersoll, Esq. who having politely furnished them to the reporter, the whole were deemed of sufficient importance to be introduced in this place.

CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE

PENNSYLVANIA DISTRICT.

1809.

FISHER *against* CONSEQUA.

FOREIGN attachment, case; bail demanded, six thousand dollars.

On motion of *C. J. Ingersoll, Dallas, and Ingersoll*, for the defendant, the court granted a rule on the plaintiff to shew his cause of action, and why the attachment should not be dissolved.

Morgan, Rawle, and Lewis, for the plaintiff, produced and read the following affidavit.

“ Redwood Fisher, the plaintiff above named, on his solemn affirmation, in due form of law administered, affirms;
“ that in June 1805, he shipped on board the ship *Pennsylvania*
“ Packet, a ship then in the port of Philadelphia, bound to
“ Canton, seven thousand five hundred dollars; that on the
“ 24th day of June, this affirmant, as one of the supercargoes
“ of the said ship, sailed from the capes of the Delaware on
“ board, on said voyage for Canton: that on the arrival of
“ said ship at Canton, in January 1806, this affirmant, as one

1809.

“ of the supercargoes, secured the said ship with Consequa,
“ hong merchant there, and made a contract with him, to
“ furnish, for the ship, a cargo of teas, of the very best qua-
“ lity, for the Amsterdam market; this affirmant stated to the
“ said Consequa, that as none but teas of the very first qua-
“ lity would at all answer for the Amsterdam market, that
“ price was not of so much consequence as *quality*; that this
“ affirmant, accordingly paid the said Consequa, the highest
“ cash prices, under the said contract, and received the most
“ unqualified assurances, from the said Consequa, that the
“ said cargo would prove of the very first *chop*, or quality, at
“ the sales in Amsterdam; and that, if it did not, he, the
“ said Consequa, held himself bound by his said contract with
“ the affirmant, to make good all deficiencies. And this af-
“ firmant further says, that in the month of March 1806, the
“ said ship, so laden with teas, purchased of the said Conse-
“ qua, by this affirmant, left the port of Canton, and in the
“ month of August next ensuing, arrived at this port of Phi-
“ ladelphia, where the said cargo was, with a small exception,
“ landed, under the inspection of this affirmant; that in the
“ month of March 1807, the said cargo was, under the in-
“ spection of this affirmant, laden on board the ship William
“ P. Johnson, at this port of Philadelphia, for Amsterdam.
“ And this affirmant further says, that at the time the said
“ teas were laden on board the said William P. Johnson, they
“ were free from any sort or kind of damage whatsoever, re-
“ ceived since the said purchase. And this affirmant is in-
“ formed and verily believes that the said William P. John-
“ son, with her said cargo, arrived in safety at the port of
“ Amsterdam, and that the teas constituting her cargo were
“ lodged, free from damage, in the stores of the Dutch East
“ India Company, where, being examined, by a sworn officer,
“ they were found to be of the most common and indifferent
“ kinds, excepting only a small parcel of pecco tea; that the
“ whole of said teas were sold by the said East India Com-
“ pany, at Amsterdam, in August 1807, and July 1808, for
“ the highest prices that could be obtained for them; and al-
“ though, at the latter period, the ports of Holland being shut,
“ had occasioned a greater rise in the price of inferior teas,

1869. " than in those of the best quality; yet, the difference between
 " the best price that could be actually obtained for the teas
 " in question, and that which an equal quantity, of the qua-
 " lities contracted to be furnished by the defendant, would
 " have sold for, according to the rates of sale, at the same
 " time and in the same place, amounts to at least four thou-
 " sand five hundred dollars; in which sum, exclusive of inter-
 " est, the defendant is justly indebted to the plaintiff."

It also appeared that there had been a former attachment, taken by the same plaintiff, against the same defendant, in the common pleas of the first judicial district, which had been discontinued.

For the defendant. A foreign attachment will not lie, either by the custom of London, or under the Act of Assembly of Pennsylvania, where the demand is for *unliquidated damages*.

First, as to the custom of London:—

If *A* is indebted to *B*, and *C* is indebted to *A*; *B*, upon entering a plaint against *A*, may attach the debt due from *C*.(a)

Judge Washington,

It is unnecessary to multiply cases, to shew, that under the custom of London there must be a *debt due*.

The counsel for the defendant proceeded:—

The legislature, in framing the act of 1705, certainly took for their model the customs of London and Exeter, concerning foreign attachments.(b)

From the preamble of the act of 1705, it is evident, that cases of *unliquidated damages* were not contemplated; " debts contracted or owing" are the words of the law. The preamble of a law is considered to be a key to the enacting part. The first enacting clause does not extend the preamble. The third section contains a solitary expression, " other demands;"

(a) Roll. Abr. 551. Priv. Lond. 254.

(b) 1 Dall. Rep. 377, *M'Clenahan et al* against *M'Carty*.

but, as the preamble and previous sections confine the issuing of an attachment to *debts*, this expression, which is in a restraining *proviso*, cannot extend the terms of the enacting clause. 1809.

The preamble of the law of 1789, is confined to cases of *debts*. It will also be found, upon a recurrence to the domestic attachment laws, that they contemplate a *debt* being *due* or *owing*.

The word "*demand*," on which the plaintiff relies, is too comprehensive; it would include cases of *torts*; a doctrine that would be monstrous. It will be recollected, that on foreign attachments, a judge, in vacation, has no power to interfere; it is to the court alone that application must be made; and thus, property to an immense amount might be arrested from the hands of a defendant, upon a supposed claim of damages, or for a groundless demand.

Secondly. Has the plaintiff made such an affidavit as would entitle him to special bail? Is the deposition filed, a "positive affidavit of a real subsisting debt?" It would appear that it was not. In the only point wherein it is positive, it discloses no cause of action. The part which contains a cause of action, refers to information derived from sources other than the plaintiff's own knowledge. No indictment for perjury could be maintained on this part of the affidavit, though the facts were untrue.

Lastly. A former attachment having issued, the present cannot be supported. In this question the personal liberty of the citizen is, indirectly, involved. It is a general rule, that a man cannot be held to bail in successive actions for the same cause.

For the plaintiff. An attachment lies in all cases of contract, whether for a sum certain, or sounding in damages.

This question must be decided on our Acts of Assembly, and not on the custom of London; though it is denied, that under that custom, the plaintiff's remedy was confined to cases of *debt*. The authorities produced prove merely, that *unliquidated damages* cannot be attached. It is said, that the

1809. preamble is narrower than the enacting clause; if it is so, the latter must prevail. In the third section, we find the words, “debt or demand;” and it will be observed, that this is the first instance where the cause of action is noticed. The recurrence of the word, *debt*, in the fourth section, does not weaken the argument drawn from the word *demand*, for that section speaks of the demand, after the judgment, when it becomes a *debt of record*.

Before the plaintiff in the attachment can take an execution, he must give security; (a) where then is the inconvenience complained of? But suppose an inconvenience did exist, are this court to provide a remedy?

There are no decisions directly on this point. The case of Jolly against Barber was for a *tort*, but this question did not come before the court.

Is this a case in which the plaintiff would be entitled to demand bail?

Judge Washington,

That appears to me to be the question.

Plaintiff's counsel.

Special bail is demanded in trover, without a judges order. (b) In Moulty against Richardson, (c) it was decided, that an affidavit of debt to hold to bail, “in such a sum as the plaintiff computes it” was sufficient.

Judge Peters.

I know of no form of affidavit here; we have adopted in a measure the English practice; but, in some cases, a discretion is exercised by the court or judge.

(a) 1 Bin. Rep. 25, Myers against Urich.

(b) 2 Cowper's Rep. 529, Charter against Jaques et al. 2 Str. Rep. 1192, Catlin against Catlin. 1 Wilson's Rep. 23, same case.*

(c) 2 Bur. Rep. 1032.

* Vide 9th East Rep. 325, *regula generalis*, no special bail in trover or detinue, without a judge's order.

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Plaintiff's counsel.

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It is not clear that debt would not have lain here; it will lie on a *quantum valebat* "*id certum est quod certum reddi potest.*"

As to the objection, that there was a former attachment, that will have no weight, unless there was vexation.

A few days after the argument, the court inquired, if the plaintiff meant to rely on the affidavit filed, which was defective as to the proof of the loss at Amsterdam. The plaintiff then produced the following affidavit.

"Redwood Fisher, the plaintiff in this case, on his solemn affirmation, declares and affirms, that the defendant, Consequa, is justly indebted to him in the sum of four thousand five hundred dollars, exclusive of interest, upon a promise and undertaking made by the defendant, for a good and valuable consideration, by him received, to deliver to the plaintiff a large quantity of teas of a certain quality; which said promise and undertaking he hath not complied with, but hath broken."

Peters, justice.

This case is very important in its consequences to the commercial interests of our country, and peculiarly to those who trade with the people of the nation to which the defendant belongs. The commerce with China is confined to one port; and those of other countries who trade with the Chinese, have not a choice of individuals generally, to whom they must trust their affairs and property; nor can they personally transact their own business. They may select one of a small number of merchants, six or seven, styled *the hong*: but on one or other of these they must *secure*, as it is termed, that is, on his integrity and capacity they are bound to rely, for the good or ill which attends their commercial enterprises.

The inhabitants of China have a peculiar aversion to tra-

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velling, and a marked contempt for the people of other nations. Few are therefore seen beyond the limits of their own territories. Those who compose the hong particularly, can never be found in other than the country of their birth and residence. It is therefore next to an impossibility to obtain justice by personal arrests, in the countries of the merchants who deal with them. The prejudices against foreigners render it difficult to procure redress of wrongs, when application for the purpose is made in a country of such singular habits, manners, and customs. Instances of application to judiciary tribunals there, are unknown or rare. And though retributions are rendered in some cases, they are so done by the hong, or through their instrumentality, and not always from motives grounded on the principles of positive or reciprocal justice. Therefore, before we deny an attachment to our citizens, against the effects found here, of a supposed wrong-doer, whose person can never be arrested, it should appear clear beyond dispute or doubt that the proceeding is either unauthorised, or forbidden, by our laws. If these have provided no remedy, the court can give none; but we should deliberate with great caution before we deny to our citizens a remedy that is given to others against them. If none can be had on their part, for wrongs arising out of breaches of contract, by the people of a country where such wrongs are almost proverbial, inequality of remedy may be productive of the most deplorable injustice, and stimulate to more frequent repetitions of injury. I do not make these observations in reference to the defendant in the present suit; for its merits I do not know, nor in its present stage am I bound minutely to inquire into them. Whatever they may be, I have now no other duty to perform, than to see that the plaintiff pursues, on probable grounds, and not vexatiously, a legal mode of instituting his suit for the purposes of justice, which must be distributed impartially to suitors, whether citizens or strangers. Much has been said about the abuses and hardships to which foreign owners of property, or creditors of our citizens would be subjected, by laying hands on their goods, or debts, to compel investigation into alledged breaches of contract, or respon-

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sibilities for injuries done to our citizens. But I see no abuses in such cases, to which personal arrests are not liable; nor can we refuse what the law warrants, because its process may be, and is too frequently abused. It would be an irksome, and I think unnecessary task, to review in detail the authorities, produced in support of the analogy between our law and the practice under the custom of London; or the decisions, in points to which it is there applied. If they should ever justify the allegation, that no attachment can there be maintained where there is not a specific ascertained debt, I am not convinced that they should control our construction of the law and practice of our own country, which, although they may have flowed from similar principles in some provisions, do not confine themselves within the limits of that practice and custom. Nor does it appear to me clear, that the *quantum* must be exactly ascertained, though the authorities seem to prove, that the cause of action must be grounded on a demand predicated *on a debt*. Debt derived from *debitum*, in the language we use, and which our ancestors have collected from all tongues, is derived from the Latin *debeo*, which means not only to owe money, but *to be bound to one*, that is to be liable to performance of a contract. Also, *I ought or should*, that is amenability to comply with engagements. It may appear from these authorities, that there must be a *debt* due to the *defendant* in the attachment there, from the person or garnishee in whose hands it is attached; and it should seem that nothing but debts can be thus attached. But our law goes further, and permits the attachment against those who are not resident, or those who being resident and about to remove, refuse to give sufficient security, to be laid on their *goods, monies, or other effects*. It also amplifies the causes of attachment, by adding to *debt* the words, *or other demand*. It is true, the words, *or other demand*, in the third section of the law of 1705, seem to relate more particularly to domestic attachments; but they also evidence that other demands than *debts*, strictly so called, were the objects. Both foreign and domestic attachments are the subjects of the clause; affidavits of cause of action may be in both required;

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and I do not see why either should be confined to debts literally and strictly. The practice, on attachments in actions on the case, of issuing writs of inquiry after judgment by default, shews, that unliquidated demands are frequent causes in which attachments are supported. In the case of Doane against Penhallow, in the state court, no objection was made, that the suit was founded in a tort, or marine trespass. This case shews the opinion of the state court, that the principles prevailing as to holding to special bail, also regulate the decisions in cases of attachments; and that discontinuance of the suit will not disable the plaintiff to bring another action, where no circumstances of vexation appear. The demand may be and always is reduced by the final judgment, to a pecuniary retribution: and this becomes a *debt*. Whenever this shall be thus liquidated and ascertained, the defendant, by entering bail, may throw the whole matter open and at large, and leave the quantum *unliquidated* and *unascertained*, and subject to investigation and uncertainty, as it must have been at the commencement of the suit.

It is in the nature of controversies on contracts, either express or implied, that the demand for non performance must be at first unascertained and unliquidated. Neither party of himself will reduce it to certainty. *Quantum valent* for goods delivered, *quantum meruit* for services and labor performed, are of this nature. Yet special bail in such cases is not denied, but on the contrary, is usually allowed. I have here introduced this subject of special bail, because the Act of Assembly recognises it, and gives it the efficiency to dissolve the attachment even after judgment, if the *money* (for there the whole demand is money) be not paid. It seems to be allowed on all hands, that there is no criterion, by which to test this subject, more proper than that afforded by the law and practice in cases where special bail is demandable. And I think them very analogous, because attachments are the means to obtain an appearance, at the defendant's choice, to the suit: and special bail (which is the legal appearance in cases of attachments) is permitted, and can at any time before payment, which closes the transaction, be substituted. That

special bail would be taken in all torts, merely sounding in damages, I do not assert; though in those very atrocious, it is allowed. That personal arrest and bail occur in some cases, where attachments against the effects of non residents will not lie, I do not deny. One case mentioned, where the attachment was quashed, because the person of the defendant was within the state, is one, and I think a just exception to the general rule, that an attachment is maintainable where special bail is legally demandable. I have no idea that goods are more sacred than personal liberty, but in my estimation they are less so. If more goods or effects than the demand justifies are attached, the excess should be released, on the principles on which excessive bail is reduced. 1809.

Having fixed in my mind the analogy between the arrest of the person and the attachment on goods as it relates to the principles I have stated, I will briefly inquire whether the present be a case in which special bail might be given.

The objections made to the form or substance of the affidavit, do not strike me with force. It sets forth in express terms a *contract*. Whether the plaintiff can or cannot prove this contract, when the cause is at maturity, is not now the question. He avers positively, and affirms to it, as well as to the payment of the money, which was the consideration on which it was founded; and in this stage it is sufficient to shew cause of action. The breach of this alleged contract he avers in part on the information of others, though he positively affirms to many steps within his own knowledge. He affirms positively to the sum in which the defendant is indebted to him, to wit, four thousand five hundred dollars. This view of the case, as it depended on the first affidavit, was taken before filing the second. The latter is full and sufficient, and in my mind, removes every objection. He may mould the form of his action in any way the contract warrants. It does not follow that it will be one setting forth merely, fraud, negligence, or tort. I do not hesitate to say, that in such cause shewn, and such a specific sum affirmed or sworn to, I should on a question of bail, direct special bail to be given.

On the objection that another attachment has been brought in another court and discontinued, I can only say, that tho'

1809. vexatious suits should be discouraged, nor should bail be allowed under some circumstances, where suits are repeated. I do not see in this a solid reason for applying a rule, which in some cases is just and proper. Occasions frequently occur, where from want of preparation or other causes, suits are discontinued and renewed without motives of oppression or just grounds of complaint.

It is to be regretted, that no decision in the state courts, on the point agitated in this cause, is sufficiently clear and direct, to guide us in our judgment; nor has the practice under 12 G. 1, been adopted here. It is my constant habit in justifiable cases, to lean in favor of giving bail. I have the same inclination in cases where the defendant is put in a state of responsibility, by attachment of his goods and effects, to abide the inquiry into the existence, the performance, or breach of an alleged contract. For in this view I think the subject ought to be regarded, and not in that of a suit against a mere tort-feaser, or negligent or fraudulent agent. And if he were alleged to be of the latter class, he is not one of the plaintiff's choice under common circumstances, and therefore his liability should be secured in every way the law will warrant. It must, therefore, seem that my opinion is against the motion to quash the attachment.

Washington, Judge.

In deciding the question, whether a foreign attachment will lie in such a case as the present, I shall come at once to the Act of Assembly, passed in 1705, which first authorised this mode of proceeding; and inquire what is its true meaning, in relation to the point now under consideration. I do not by this mean to say, that in no instance ought the custom of London, in respect to foreign attachment, to be regarded. It may be, and in practice has probably been, frequently referred to with advantage. But I should not feel myself authorised to extend or limit this remedy by rules established under the custom, where such rules are broader or narrower than the law of this state.

It must be admitted, that according to a strict and literal

construction of the Act of Assembly, the foreign attachment is confined to cases of debt: and not only so, but to debts contracted or owing within this state, by persons absenting themselves therefrom. The third section, which was much relied upon by the plaintiff's counsel, as extending the remedy to *other demands* than debt, is, in this respect, clearly confined to residents about to abscond or to leave the state, and who refuse to give security to the complainant for his debt or other demand. The nature of the case presupposes an inability in a non resident to give such security. Nevertheless we find the law has received in practice a liberal construction, so as to embrace debts contracted in foreign countries, by persons who never did reside here; and who, of course, could not properly be said to absent themselves; and which debts, neither by the terms of the contract, nor by the removal of the debtor hither, could be said to be *owing* here. 1809.

This is a remedial law, and ought, upon the soundest principles of construction, to be so extended, as to remove the mischief, and to advance the remedy. The mischief, as the preamble informs us, was, that the effects of absent persons were not liable, equally with those of persons dwelling on the spot, to make restitution for debts contracted; to the injury of the inhabitants of Pennsylvania. The remedy provided for this end was a process, by which the property of absconded or absconding persons, found within the province, was rendered liable to make satisfaction. But the same preamble speaks of *debts contracted or owing*; and it is contended, that the remedy can be extended only to cases of debt.

What is a debt? In strict law language it is a precise sum, due by express agreement; and does not depend upon any after calculation to ascertain it. The remedy for recovery of it, is by action of debt, and frequently by action of *indebitatus assumpsit*. But is this the only case within the mischief intended to be remedied by this law? Surely an inhabitant of Pennsylvania is not less injured by the want of a remedy to recover what is due to him by a foreigner, upon a sale of property where no price was stipulated, than he would be if a fixed price had been agreed: and yet, in the former case, neither debt nor *indebitatus assumpsit* would lie. In the latter

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case, the defendant is indebted to the plaintiff in a precise sum; and in the former, a sum equal to the value of the property sold; not then, it is true, liquidated, but depending on the value to be fixed on the trial. The uncertainty of the sum due, though it may be material to the form of the action, does not, in the common understanding of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labor is worth; or as much as the same kind of goods may sell for on a certain day, or at a certain market; or to pay the difference between the value of one kind of goods and another, creates, in common parlance, a debt; and the person entitled to performance does not speak of his claim as for damages, but for a debt, to the amount of which he considers himself entitled.

But it is not every claim that upon a fair construction of this law, or even in common parlance, can be denominated a debt. For, in the first place, a demand must arise out of a contract, without which a debt cannot be created; and the measure of the damages must be such as the plaintiff can aver by affidavit to be due, without which special bail (by giving which the defendant may dissolve the attachment) cannot regularly be demanded.

It follows from this, that a foreign attachment will not lie for demands which arise *ex delicto*; or where special bail would not be regularly required.

Although we meet with no adjudged case in this state, precisely upon the point of this cause, yet enough may be gathered, from what has fallen from the judges, to shew how this attachment has been considered in practice.

In *M'Clenachan against M'Carty*, (a) the judge (president Shippen,) says, that "after judgment against the defendant in the attachment, the plaintiff files his declaration, according to the nature of the demand. If in debt, no oath is required—if *in case*, then a writ of inquiry issues, to ascertain the demand." Now if *indebitatus assumpsit* were the only declaration upon which the writ of inquiry could issue, it is hardly to be believed, that the judge would have used so

(a) 1 Dallas, 375.

comprehensive an expression as that of a *declaration in case*. It is most obvious that his mind took a more enlarged view of the remedy, and considered it as embracing other cases than those of *debt*, strictly so called. So too, when the court say, in other cases, (1 Dall. 219., 2 Dall. 79.) that it is the practice to inquire into the cause of action in a foreign attachment, as in that of bail on a *capias*, and to dissolve in the one instance, where they would not hold to bail in the other, I consider the practice, in relation to bail, as so far connected with that of the foreign attachment, that if, *regularly*, bail would be required in matters of contract, the attachment would not be dissolved.

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This is a case of contract ; by which the defendant binds himself to deliver to the plaintiff teas of a certain quality, and suited to a particular market, and, on failure so to do, to pay the difference between teas of such quality, and such as should be delivered. Teas agreeable to contract were not delivered ; and the plaintiff swears that the difference amounts to 4500 dollars. Whatever be the difference, the defendant has promised to pay it ; and of course is, to that amount, indebted to the plaintiff : and, if he were present, and served with a *capias*, he would be held to bail of course.

There is therefore, upon the principles before stated, no ground to dissolve the attachment.

As to the other ground taken by the defendant, that an attachment against his property by the same plaintiff, and for the same cause of action, was instituted in the common pleas of this state, and afterwards discontinued ; there is no evidence of an intention to harass the defendant, so as to induce this court to dissolve the attachment : which (unlike the case of holding to bail, where the second action still proceeds,) would be tantamount to a denial of any remedy at all to recover the amount he thinks himself entitled to. I am not prepared to say, that the rule observed in relation to discharging on common bail, on the ground of vexation, is at all applicable to the case of dissolving an attachment. On this point, however, I give no opinion.

1811.

MUNNS, against DUPONT AND BAUDUY.

THIS was an action brought by Charles Munns against Eluthere Irene Dupont de Nemour and Peter Bauduy for damages for a malicious prosecution.

The declaration contained three Counts, viz.

First, That the defendants maliciously and in order to deprive the plaintiff of his good name, without any reasonable or probable cause, charged him before Michael Keppeler, one of the Aldermen &c. with having committed a larceny in stealing a brass pounder, and three drafts of machinery for a powder manufactory of the value of ten thousand dollars, the property of Dupont and Bauduy and caused, and procured him to be arrested and detained in prison, in Philadelphia, from the 23d of December 1808, until the 6th of January following.

That the defendants on the 25th of December 1808, at New Castle charged him before Edward Roche, Esq. one of Justices, &c. with a felony in having stolen a certain brass stamper of the value of 40 dollars, and sundry other articles the property of said defendants.

That the defendants on the 29th of December exhibited the said charge to George Truitt, Governor of Delaware and caused and procured him to signify to Simon Snyder, Governor of Pennsylvania, that the plaintiff stood charged with felony in the State of Delaware, and had fled from justice and was then in prison in Philadelphia, and caused and procured him to be demanded as a fugitive from justice and caused and procured him on the 6th of January 1809, to be put in irons, and to be transported and conveyed from Philadelphia to New Castle.

That the defendants on the 6th of January 1809 at New Castle caused the plaintiff to be arrested and taken into custody and imprisoned in gaol at New Castle under the pretext aforesaid and there kept from the said 6th of January, until the 4th of February 1809, when he was discharged by Kinsey Johns, chief justice of Delaware on a habeas corpus.

That the defendant falsely and maliciously, at New Castle, on the 10th of February, charged the plaintiff with feloniously &c. taking &c. a certain brass stamper of the defendants. or causing the same to be done, and caused the plaintiff to be arrested thereon.

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MUNN
against
DUPONT.

That the defendants caused and procured the plaintiff to be committed on the 18th of February at New Castle, to prison, and kept him there; from said 18th of February until the 13th of March, when he was a second time discharged by Kinsey Johns, chief justice of Delaware. That the defendants preferred a bill of indictment to the grand inquest of New Castle County charging the plaintiff with receiving five pieces of parchment Sieve of the value of Five Dollars each piece, and one piece of the value of One Dollar, knowing them to have been stolen, that they procured the same to be found a true bill, that they caused the plaintiff to be arraigned thereon, that they caused him to be committed to the custody of the sheriff of New Castle and to be imprisoned from the 24th of May until the 12th of October following, and until William Frazer and George Young had entered into a recognizance for his appearance at the next Term, and that they had laboured &c. to convict the plaintiff of said false charge, but on the 14th of December 1809, a jury being empannelled &c. found that he was NOT GUILTY, and he was thereupon discharged.

Second Count. That the defendants maliciously &c. combined and confederated to cause the plaintiff to be arrested and imprisoned from the 23d of December 1808, until the 14th of December 1809, and in pursuance thereof charged him on oath before Michael Keppeler, Esquire, one of the aldermen of Philadelphia, with having stolen &c. a brass pounder, three drafts of machinery for a powder manufactory of the value of Ten Thousand Dollars, of the property of Dupont, &c. of which he was not guilty, of which they well knew, and that in pursuance of the said conspiracy they caused him to be arrested on the said false charge by a warrant of the said Michael Keppeler, and caused him to be imprisoned in the gaol in Philadelphia at hard labour.

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That the defendants maliciously &c. conspired and confederated, to cause the plaintiff to be arrested, &c. and put in irons &c. and conveyed from Philadelphia to New Castle, and in pursuance thereof charged him on oath before Michael Keppeler, Esquire, with having stolen a brass pounder, and three drafts of machinery for a powder mill of the value of Ten Thousand Dollars of the goods, &c. of Dupont, &c. and procured the said Michael Keppeler to issue a warrant, by virtue of which he was arrested at his dwelling, and forcibly taken before the said Michael Keppeler, who forcibly took his pocket-book, and opened and examined it without his consent, and took sundry papers therefrom and required of him to give bail in the sum of ten thousand Dollars, to appear at the next Mayor's Court, or be committed &c. which he was not then, or afterwards able to procure, which they well knew, and that the plaintiff being unable, &c. was at their instigation committed to prison, and there kept until the 6th of January following, when in pursuance of the aforesaid conspiracy they caused him to be put in irons and conveyed to New Castle to be delivered to the gaoler at New Castle, and there kept until the 4th of February following.

That the defendants at New Castle on the 23d of May 1809, of their further malice, &c. conspired, &c. to cause him to be indicted at New Castle aforesaid, and in pursuance thereof without cause, &c. preferred a bill to the grand jury against him, charging him with receiving five pieces of Sieve of the value of Five dollars each, and one piece of the value of One dollar, knowing them to have been stolen, and procured the same to be found a true bill, and maliciously prosecuted the same until the said Charles Munns was of and therefrom acquitted in due form of law.

Third Count. That the defendants maliciously, &c. and when nothing was due to them, caused a writ to be issued from the Common Pleas of Philadelphia County against the plaintiff, and demanded bail in six thousand Dollars, which the said Charles Munns was unable to procure as they well knew that he was committed, and imprisoned from the 29th

of December 1808, until the 6th of January following, when the suit was discontinued and ended.

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To the damage of the plaintiff one hundred thousand dollars.

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The defendants pleaded not guilty.

It appeared that Munns had formerly been employed in the manufacture of gun powder; that he afterwards kept a school, which he gave up in November 1808, and that he entered into a contract with the firm of Brown, Page & Co. of Richmond (Virginia) to superintend a gun powder manufactory, they were at that time about to establish; that Munns was sent to the northward, for the purpose of procuring workmen and machinery; that he left Richmond on the 6th of December, and arrived at Wilmington (Delaware) on the 9th of the same month; that he took his lodgings at the tavern of Peter Hendrickson, on the Kennet road, about three and a half miles from Wilmington, and about four miles from an extensive manufactory of gun powder, belonging to the defendants. Munns remained at this inn from the 9th until the 14th of the month, during which time he had many interviews with the defendants workmen. He treated them; and on behalf of his employers in Virginia, engaged one Hanse Pebles, who was then employed in the manufacture of salt-petre, and also Joseph Bowman, who was stated by the defendant's witnesses, to have been employed by the defendants, but who, the plaintiff's witnesses declared to have been a journeyman millwright, then working under one Mitchell, a master millwright, who was at that time employed in building a saw mill for the defendants. It further appeared that Munns by promises and money, induced the said workmen to procure for him some small pieces of perforated parchment, similar to the sieve used in the manufactory of the defendants, to granulate the gun powder. One of the witnesses saw Hanse Pebles cut some pieces of this parchment out of a sieve, that was worn out and thrown by; and he declared that he believed the pieces, traced to the possession of the plaintiff, as hereafter stated, were the same.

It was also in evidence, that similar pieces of perforated parchment were thrown away as useless, and were seen lying

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both within and without the defendants enclosures. Munns also prevailed on Bowman to bring him a brass stamper or pounder, from which to take a model ; that he (Munns) desired Bowman to return it to the manufactory, but he did not return it, and it was never afterwards found.

The defendants came to the inn during one of these interviews between Munns and the workmen of the defendants : Dupont sarcastically asked Munns if he had gotten powder men enough, and immediately fell to beating him with a chair whip, the stock of which he held in his hand. Through the interference of the landlady, Dupont after some time desisted. The defendants then ordered the plaintiff to quit the neighbourhood, under the penalty of a second beating.

Munns came to Philadelphia. He took the pieces of perforated parchment, he had received of Hanse Pebles, to one Goetz, a gun-smith, to procure punches to be made, and informed Goetz he had obtained them at the manufactory of the defendants:

On the 23d of December 1808, the defendants obtained from Mr. Alderman Keppele, a warrant against the plaintiff, charging the plaintiff, upon the oaths of the defendants, with having committed a larceny, in stealing a brass pounder, and three drafts of machinery &c. of their property, and of the value of ten thousand dollars.

The officer who was employed to arrest the plaintiff, met him in the street, and suspecting him to be the person of whom he was in search, enquired his name ; the plaintiff denied his name, and affected to speak a foreign dialect. The officer took him to the house of the high constable, where the charge was made known to the plaintiff ; upon which he said, if that was all, he would go with them whither they would.

The plaintiff was taken to the office of Mr. Alderman Keppele. The defendants attended there with their counsel. Alderman Keppele demanded the plaintiff's pocket-book ; in it were found, among other things, a copy of a letter the plaintiff had written to his employers, in Richmond, wherein he in-

formed them of his having been beaten; that he had got the draft of the brass pounder &c.

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There was also found in the pocket-book, a letter from Brown Page and company to the plaintiff. (*)

His trunk was sent for to his lodgings, and it also was searched, as was also his person.

The Alderman demanded security in fifteen thousand dollars; for want of which, the plaintiff was the same day committed to the prison of the city and county of Philadelphia, where he was put among the vagrants, persons committed for trial, and such convicts as were sentenced to undergo an imprisonment not exceeding six months. He was compelled to work at picking hair and ocum.

After the plaintiff was committed to prison Mr. Alderman Keppele took the person, in whose house the plaintiff had boarded, to the post office, who at the request of the Alderman took therefrom a letter directed to the plaintiff; which letter Mr. Keppele broke open.

On the 26th of December, the plaintiff sued out a writ of habeas corpus before the president of the Court of Common Pleas of the 1st judicial district of Pennsylvania, who on the 27th, after a hearing, reduced the bail to one thousand dollars.

On the 29th of the same month, the defendants commenced a civil action against the plaintiff, in which they demanded bail in six thousand dollars.

On a citation before the same judge the day of the bail was reduced to six hundred dollars.

In the affidavit, which the defendants made, to hold the plaintiff to bail, it was stated that the plaintiff had enticed away seven of the defendants' workmen. The letters taken from the plaintiff and from the post office, were produced before the judge, by the counsel of the defendants.

On the 25th of December, one of the defendants went before Mr. Justice Roche, of Delaware county, and made

(*) The reporter regrets that he has not copies of these letters.

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oath that the plaintiff had stolen a brass stamper, and other articles of their property of the value of forty dollars.

On this affidavit, the Governor of Delaware, on the 29th of December, demanded the plaintiff of the Executive of Pennsylvania, as a felon absconding from Justice.

On the 6th of January 1809, the defendants discontinued the civil action brought by them against the plaintiff. On the same day the plaintiff was put in irons, and conveyed in the stage to the state of Delaware.

While in the stage, he told the officer, that Bowman had stolen the brass pounder, and that he had brought it to the plaintiff, and he had got the dimensions, and he did not know what Bowman had done with it.

When they arrived at Wilmington, Dupont ordered the irons to be taken off the plaintiff, and sent the plaintiff and the officer in his private carriage to New Castle, where the plaintiff was lodged in prison.

A few days after the plaintiff was committed, one of the defendants declared, that they had nothing criminal to charge against the plaintiff, but that they had put him in jail as a witness against the damned rascals in Virginia.

The defendants ordered the sheriff to provide the plaintiff with what was comfortable, which was done for some time, after which the order was countermanded. After that time he lived sometimes on the prison fare, and sometimes on provisions obtained at his own expense from a tavern.

On the 31st of December, the defendants sued out a writ of arrest against the plaintiff, in which they demanded bail in two thousand dollars.

On the 31st of January 1809, the plaintiff obtained from chief justice Johns of Delaware, a habeas corpus, and on the 4th of February was, by the chief justice, discharged on the ground that the warrant, from the Governor of Pennsylvania, was insufficient to hold him; that he ought to have been committed anew.

A citation, to shew cause why the plaintiff was held to bail in the civil action, was heard at the same time.

The defendants made oath that the plaintiff had enticed away one of their workmen; whereupon the Chief Justice held him to bail in the sum demanded.

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On the 2d of February, the defendant Bauduy went before Mr. justice Roche, and made oath, that on or about the 13th of December, a certain brass stamper, used in the manufactory of gun powder, and other articles, all the property of E. J. Dupont and company, were feloniously taken and carried away from their powder manufactory by *some person or persons unknown*, and that he had good grounds to suspect and believe, and did suspect and believe, that the same were taken and carried away by the plaintiff, or by his advice or procurement. Upon which the said justice issued his warrant, had the plaintiff brought before him, and committed him to answer this charge.

On the 11th of March, the plaintiff was again brought before the Chief Justice of Delaware, who again discharged him from the criminal warrant, but he was remanded on the civil suit.

At one of these hearings the counsel of the defendants produced some of the letters taken from the plaintiff, and one taken out of the post office, by the order of Mr. Alderman Keppele.

At the court of Quarter Sessions of New Castle county, held day of May, a bill of indictment was preferred to the grand jury, against the plaintiff, for receiving five pieces of parchment sieves, of the value of five dollars each, and one piece of parchment, of the value of one dollar; which was found, by the jury, a true bill. A bill was also sent against Hanse Pebles for stealing these articles, but it was returned ignoramus.

The officer, who had conducted the plaintiff from Philadelphia to New Castle, was paid by the defendants. He was also paid by them to go to New Castle, for the purpose of appearing as a witness to this bill.

On the 12th day of October following, Munns with two sureties, were recognized for his appearance at the then

1811. next court of Quarter Sessions for New Castle county, to answer the charge.

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On the 14th day of December 1809, he was tried and
ACQUITTED.

This cause was conducted, on the part of the plaintiff by Browne and Rawle, and on behalf of the defendant by C. J. Ingersoll and Binney.

The COURT,

WASHINGTON, Judge, gave the following elaborate charge to the jury.

It appears that the plaintiff, Charles Munns, having been previously acquainted with the art of manufacturing gun powder and having on a former occasion been employed in that line, by another person, did in the year 1808, enter into a contract with Brown, Page and Co. to superintend the manufacture of that article, which they intended to carry on at Richmond in Virginia: That some time afterwards, either for the purpose of gaining information or procuring workmen, or certain materials that might be necessary in the manufacture, he was dispatched to the Northward; where his destination was ultimately to be, or whether it was to any particular place, does not certainly appear; but a conclusion on that head may be, in some degree, drawn from the circumstances which followed. It appears, that he came in the stage to Wilmington (Delaware), and was shortly after discovered at a tavern kept by Peter Hendrickson, about an half a mile from the gunpowder mills of Dupont and Bauduy, on the Brandywine Creek, and four or five miles from Wilmington. I think it was stated that he remained there from the 9th till the 14th of December. The defendants, after some time, heard he was there, and went over to see him; and, from the manner in which they accosted him, it seems that they had been informed of what he was about. Very soon after his having fixed himself at the Buck tavern, C. Munns had contrived to open a correspondence with the de-

fendant's workmen, and they visited him often ; the avowed object of the plaintiff was to tempt them to desert the service of the defendants, for that of his employers, and to obtain from them such of the patterns of Dupont and Bauduy's machinery as he deemed might be useful at the Richmond establishment. It appears, that some of those workmen were tempted by the offer of money, to leave the defendants service, and to procure patterns, and particularly that of the brass pounder ; nay, that he engaged Bowman to bring him the brass pounder, that he might take a pattern of it.

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The defendants hearing of these circumstances, and observing the frequent intoxication of their workmen, went to Hendrickson's to see Munns ; and you must remember, they sarcastically asked him, if he had got gun powder men enough, before they proceeded to assault and beat him. The assault and battery was an offence on their part, but, for this, they have been punished by the laws, of the government of Delaware, which were offended ; and you are therefore to discharge that circumstance from your consideration : It is not a subject for which damages are, or now can be claimed. He was not only beaten by the defendants, but was ordered, under threats, to quit that part of the country. It appears that he did so, and came to Philadelphia ; to which place he was soon after followed by the defendant : whether they had, or had not an intention to chastise him further, does not appear. The plaintiff, however, knew they were in Philadelphia, and suspected, as he himself declares, that they were pursuing him and " following his footsteps."

On the 22d of December 1808, the defendants applied to Mr alderman Keppeler, for a warrant to apprehend him ; on their oaths they declared, that Munns had been guilty of stealing from them the brass pounder and three drafts of machinery, of the value of ten thousand dollars. On the 23d, the officer who was employed to execute the warrant, met Charles Munns in one of the streets of this city. On seeing him, he suspected him to be the person he was in search of. The officer enquired whether his name was Munns, the plaintiff denied that to be his name, and assum-

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ed a fictitious one ; he feined to speak in the French dialect ; the officer however insisted on his accompanying him to the house of Hart, the high constable, where it soon appeared that *Munns* was his true name. Thence he was taken to the magistrate's office ; but, whether a full examination was there made into the charge which had been made against him, I do not undertake to say ; and whether the magistrate, in any of the circumstances which took place in his office, went further, than was his duty, it does not become this court to say, nor will the court say ; but it appears, from the testimony and the admission of alderman Keppele, that, on searching the person of the plaintiff, certain papers were found, which displayed the nature of the transactions in the neighbourhood of Wilmington. As to the propriety of that search, the court gives no opinion ; this is not a trial, in which that circumstance is involved. But certainly, the attempt to conceal his name, the other circumstances mentioned by the officer on his oath, and the letters obtained by the search, were sufficient grounds for the alderman to commit him for the larceny, which, the defendants had sworn was committed, or to require bail ; whether in the sum of \$15000, or any other sum was a matter whereon he might exercise a sound discretion ; but it does not appear that the defendants suggested the sum.

Two days after, namely, on the 25th of December, an application was made, by the defendants, to the Governor of Delaware, for a demand upon the Governor of Pennsylvania, for the surrender of Munns to the jurisdiction of the State, where the offence had been committed ; and, on the 6th of January 1809, he was removed, under Governor Snyder's orders, to Wilmington.

But previously to this, Munns had applied to the presiding judge of the court of Common Pleas in this City, for a habeas corpus, for the purpose of being discharged from the arrest, or that the bail demanded by the alderman might be reduced. Upon an examination into the case, that judge, reduced the bail to one thousand dollars. Soon after this, the defendants commenced against Mr. Munns, a

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civil action ; not however, for the property mentioned in the criminal charge, viz. the brass pounder and three drafts of machinery, but for having attempted to seduce some of their workmen ; and for this, the bail was fixed at *six thousand dollars*. This bail, on another hearing before the same judge, was also reduced, namely to *six hundred dollars*.

Munns, after being confined in the prison of Philadelphia until the 6th of January, was committed to the charge of a civil officer, for the purpose of being conveyed to Delaware. He was handcuffed by the direction of that officer, but the handcuffs were knocked off at Wilmington, at the request of one of the defendants ; he was afterwards sent to New Castle, and there confined in the jail ; he applied to Chief Justice Johns, for a habeas corpus, which was granted and he was discharged ; true, it was not on a hearing of the evidence of the crime, but because he ought not to have been committed, on a warrant or order from the Governor of Pennsylvania. The warrant of commitment ought to have been obtained from the magistrate of Delaware. This opinion being given by the Chief Justice Johns, the defendants appeared willing to repair the error they had committed, and attempted to do what they ought at first to have done. They applied to a civil magistrate, on grounds much like those, on which they had formerly applied to Mr. Keppele ; in the first application they mentioned their loss of a brass pounder, and three drafts of machinery, in the latter they call the brass pounder, a brass *stamper*, but charge other articles, which were worth *forty* dollars, instead of *ten thousand* dollars. On this suit, upon a second habeas corpus, the Chief Justice tells them they had again blundered. For, by the laws of Delaware, no person could be recommitted, except by the court, for the same offence, on which he had been once discharged under a habeas corpus. Thus the matter remained till May, when the grand jury, whether or not by the procurement of the defendants, had a bill presented to them against the plaintiff. This bill, it is true was not for *stealing the brass pounder*, but for *receiving five pieces of parchment sieves*, valued at five dollars each, and one other piece

1811. *of parchment of the value of one dollar. The defendants and other witnesses were sent to the grand jury, and upon the testimony given, a true bill was found against the plaintiff, on which he was tried and acquitted in the December following.*

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These are all the facts, on which the question of law arises, except what we shall now class under a few heads. The residue of the testimony is as to the excessive bail, required in the criminal prosecution; the immense sum of damage, laid in the civil action; the repetition of the civil action in Delaware, after it had been withdrawn in this state; the sufferings during the plaintiff's imprisonment in Philadelphia; the ignominy of being carried to Delaware in hand cuffs, and his subsequent sufferings in the jail of New Castle. With respect to these we will make two observations: If on the point of law, the plaintiff should be thought to be entitled to your verdict, the jury must estimate the damage sustained by these circumstances. With respect to *that portion wherein the defendants were concerned*, it may be relied on as evidence of malice. In these two points of view, those circumstances may be considered by you.

But, has the plaintiff made out such a case as to entitle him to a verdict? And here presents themselves the two points upon which this cause hangs; namely, MALICE, AND THE WANT OF PROBABLE CAUSE. With respect to the subject of malice, I say nothing; It does not belong to the court, but to the jury; and they are to judge of it from the circumstances of the case: positive proof of malice can seldom be produced; generally, speaking, the proof is collected from the circumstances, as they are given in evidence; the jury are to judge of the probability of the testimony and thence say, whether or not there has been malice; and there I leave that point.

If I could, without a dereliction of public duty, leave the question of *probable cause* to the jury, I certainly would; but this is a mixed question of law and fact; of the facts disclosed by the testimony, it is your duty to judge, as well as of the credit due to the witnesses. The law arising thereupon, must be

stated by the Court, and we are bound to state it, as you are bound to conform to it.

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Actions of this kind, for a malicious prosecution, are of a very delicate nature. On the one hand, if they are too much encouraged, there is great danger, not only that individuals, engaged in the prosecution of criminal charges, may suffer injury ; but that the public may suffer much more. The government acts by the agency of private individuals : the public prosecutor, the attorney general, a sworn officer, who conducts the legal proceedings after the charge is brought before the court, cannot *originate* the prosecution ; it is not his duty, nor could he in one case of a thousand, come forward in the first instance. In prosecutions, instituted for offences against individuals, somebody must prosecute ; but, if actions for malicious prosecutions be too much encouraged, who will give information without insurance against damage ? The consequence would be, that few offences would be prosecuted or punished ; On the other hand, if a proper degree of encouragement is not given to suits of this nature ; if, on a slight or unfounded suspicion, a person is to be prosecuted criminally, his fame, his liberty and property may be sacrificed, and the injured party can obtain no redress ; therefore a proper degree of attention ought to be paid by a jury, to the respective rights of both parties. The plaintiff, in such cases, must prove that his prosecutor was *influenced by malicious motives*, and the jury must be satisfied of such being the truth, and that the prosecution *was without probable cause*, before they gave a verdict for the plaintiff. If malice is proved, it is not enough ; it must be shown that there was *want of probable cause* to suspect the person charged. If *probable cause is shown*, notwithstanding the jury may *presume* malice, yet that will not be sufficient, to justify a verdict for damages.

I now come to the important point in this case.

What is the meaning of probable cause ? I understand it to be the “ *existence of circumstances and facts, sufficiently strong to excite, in a reasonable mind, suspicion, that the person, charged with having been guilty, was guilty ;*” it is a case

1811. *of apparent guilt, as contradistinguished from real guilt. If there was real guilt, the law presumes conviction. It is not essential that there should be positive evidence at the time the action is commenced ; but the guilt should be so apparent at that time as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution ; not that he knows the facts, necessary to ensure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offence. In short, whilst the innocent man is indicted from motives of malice or resentment, he must submit to the fruits of his folly, if he has justly excited a suspicion of his being guilty of the offences.*

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Now, if the jury comprehend what is meant by "*probable cause*," all I have to do, is to apply the evidence to the principles of the law I have laid down. I will make a short summary of the stated points :

First. Brown, Page & Co. are suspected of having engaged the plaintiff to go to the Northward ; what are the circumstances on which this suspicion rested ? The plaintiff, a perfect stranger, whose character was totally unknown, but as the head of a rival manufactory, comes to a country tavern in the neighbourhood of the defendants' works, obtains a correspondence with their workmen, who meet him frequently there, and whom he treats liberally with what the tavern afforded : he solicits them to leave the service of the defendants, he offers them higher wages, and gives money to them, for the purpose of procuring the patterns of certain parts of the defendant's machinery. He offers one of them (Bowman) money, to bring him the brass pounder, in order to take a pattern of it ; or, that Bowman should take a pattern himself, and bring that to him. Soon after this, the plaintiff leaves the tavern ; Hanse Pebles goes off, conformably to the engagement made with the plaintiff, whether publicly or privately does not appear ; but Bowman, who was to obtain the brass pounder, goes off privately, for he was afraid to see the defendants. The defendants miss the brass pounder, they enquire for it ; it is missing, they are informed ; and it is not found to this day.

The plaintiff comes to Philadelphia ; a warrant is taken out against him, by the defendants, for stealing the brass pounder ; on being accosted in the street, by the officer, charged with executing the warrant, he denies his name, affects to speak in a foreign dialect, and asks a question of the officer, which, whether it was foolish or imprudent, was hypothetical ; he asks, if I am in a room with a man who committed larceny, am I guilty of it ? All these facts put together, were they, coming to the knowledge of any man, sufficient to excite a suspicion of Muuns' being guilty of stealing ? I have no doubt they were sufficient ground to suspect him ; and that there was probable cause, if ever probable cause existed.

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Consider it in another point of view ; a man, though perfectly innocent, may become unfortunately an object of suspicion, and the man who prosecutes him, must be cautious how he acts. But, shall a man, who does wrong, and acknowledges that he has done wrong, and was known to have gone into the neighbourhood of a rival manufactory, colleague with the workmen to leave their service, and pay them for procuring the implements and machines of their employer ; I ask, does it become that man to say that he has been injured by *unjust* or *unfounded* suspicions ? Can that man complain that such suspicions were entertained ? most unquestionably not. The circumstances of this case, distinguish it from every other, that ever came before a court and jury.—Many men have been objects of suspicion, by being casually present when an offence has been committed ; but, here is a man, who comes voluntarily into the neighbourhood, and admits that it was on an ungenerous errand, and complains of unfounded suspicion. Was the suspicion unfounded ? What turns out now to have been the fact ? Abandoning the ground of the suspicion entertained by the defendants, and what their knowledge was at the time, as to the loss of the brass pounder, it now appears that the plaintiff acknowledged that Bowman had stolen it, brought it to him, and that he had taken a pattern or draft of it. But, did Bowman return it ? No ; whether he has retained it, left it in the neighbourhood, or thrown

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it in the creek, does not appear ; however that may be, it was equally purloined from the defendants and lost to them.

But, it is said, this evidence could furnish the defendants with no motives for their conduct, because it was unknown to them at the time they commenced the prosecution in this city. Be that as it may, it is now confirmatory of the suspicion they then entertained. It was said, that it was incumbent on the defendants to have proved that a *larceny* was committed. I do not wish unnecessarily to decide points of law, yet, if it was proper for me now to decide, I should hesitate a considerable time, before I yielded to the opinion, that the case of larceny should be made out, before the defendants could justify themselves in this action. Observe the consequence : A man takes a piece of personal property, and carries it away for some purpose unknown ; but the thing is gone, and I am able to prove that this man took it away, or had it in his possession ; but, on the trial, he brings two witnesses to prove, that he took it away for a *special purpose*, by which I sustained no injury or inconvenience ; or proves a circumstance which justifies him, but which I never heard of, nor ever could ; I think it would be going a great way, to say, he should be entitled to recover damages, though I could not prove a larceny had been committed. With respect to that point however, let it be understood, the court give no decided opinion ; though I think it by no means so clear as the plaintiff's counsel seem to consider it, that this is not a case of larceny ; the definition of which crime, is, (by C. J. Eyre) *The secretly taking from another person personal property for the purpose of spoiling him of it, causa lucri.*

What are the circumstances in this case ? The brass pounder was secretly taken from the premises of the defendants and carried by Bowman to the plaintiff ; whether after all, Bowman has taken it away with him, or thrown it into the creek, is immaterial ; he spoiled the defendants of it. Was it with a view to gain ? for if he was paid fifteen dollars for it by the plaintiff, who received it, the larceny would be complete ; but it does not appear clearly whether the fifteen dollars were paid for the brass stamper or to defray Bow-

man's expenses to Virginia, whither it appears, he has gone. Take the case under all these strong circumstances, must it not be concluded, that it was not a *mere* taking, but a *felonious* taking. But, at all events, there is *ground* to suspect a felony, and that furnishes *probable cause*, which is a justification. No verdict therefore can be given for the plaintiff, with respect to the brass pounder, as there was *probable cause* for the accusation of stealing it.

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With respect to the three drafts of machinery, charged to have been stolen, there has not been a tittle of evidence given: it has not been made to appear that the defendants ever possessed such property; therefore, it is not proper to suppose, that Munns or any other person robbed them of such articles. If this were the only charge against the plaintiff, the court would feel no hesitation in saying, there was no *probable cause* for suspicion; and the plaintiff would be entitled to a verdict. If the jury think there was want of *probable cause*, and that the defendants were actuated by malice, or that malice was inferrable from the want of it, or from the injuries which the plaintiff has suffered by the acts of the defendants, then the verdict must be given for such damage as the plaintiff has sustained, on account of this particular charge; but when these drafts of machinery were combined in the same warrant with the brass pounder, can the plaintiff say, he sustained damage by the super-addition of the three drafts of machinery? If they stood alone and you were satisfied as to the malice, and that he had sustained injury, he would be entitled to a verdict for such damage as he had sustained. But if you are of opinion that there was no malice in the insertion of those three articles in the warrant, and that he sustained no consequent injury, you will shape your verdict accordingly.

The next subject is the Delaware prosecution on Mr. Roche's warrant.

With respect to the prosecution in Philadelphia, if there was *probable cause*, then the suspicion had received additional strength from the confession of the plaintiff, before the prosecution in Delaware and which were then known to the de-

1811. defendants, for they had been informed of them by two other witnesses, Hudson and Duplant.

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I next proceed to the indictment for the five pieces of parchment sieves &c. Whether or not the defendants were the prosecutors, I cannot decide, I leave that to the jury, though I consider it immaterial.

In the first place, it was asked, what was the ground on which the defendants suspected the plaintiff of feloniously receiving five pieces of perforated parchment, worth five dollars, and the one piece worth one dollar. Wallace, another witness, states on his deposition, that he saw Hanse Pebles cut pieces of sifters of different sizes. Now, was this with the knowledge and consent of the defendants? It did not so appear; the witness saw these pieces, when produced in court after they were taken from the possession of the plaintiff; they were not those thrown on the dunghill; they were the same as delivered by him to Goetz, to make punches; for he confessed to Goetz, that he got them from the parchment sieves, and Hendrickson says, he heard the plaintiff apply to Pebles to get him such pieces, and offered him money for it. Goetz also proves, that the plaintiff's object was to make gain by these pieces of perforated parchment, or parchment sieves, as he wanted punches made, whereby they might be successfully imitated for the Virginia manufactory; after this, can it be said, that any man, knowing all these circumstances, had not ground to suspect that the plaintiff had received these pieces of parchment sieves, knowing them to have been stolen.

This case does not require an examination into the civil cause, which was discontinued on the payment of costs.

The other subject, that the grand jury found a bill against the plaintiff, though they returned another *ignoramus*, against Hanse Pebles, who cut the pieces out of the sieves, does not prove the want of probable cause; on the contrary, it is *prima facie* evidence of probable cause, and requires strong evidence on the other side, to shew that there was any want of it, and much more that there was malice.

I have now gone through this case, the whole of it presenting these two points. First, the plaintiff must affirmatively prove malice on the part of the defendants; of this you must be satisfied before you can give a verdict for the plaintiff.

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Secondly, The want of probable cause; if there be no malice, and there should be probable cause, or if there is malice, but at the same time there is probable cause, the plaintiff cannot recover.

If malice is proved and a want of probable cause, then you must give a verdict for the plaintiff, in such damages as you think proper.

The Jury retired, and the next morning returned to court with their verdict, but the plaintiff suffered a nonsuit.

IN THE CASE OF FRANCIS C. SARMIENTO.

FRANCIS C. Sarmiento applied to the District Court for the city and county of Philadelphia, for the benefit of the insolvent laws; an objection was made to his discharge on the ground of this Court having no jurisdiction. The case was argued, but the petition being withdrawn no judgment was pronounced by the court. The following is the opinion President HEMPHILL had formed at that time:

In the case of Sarmiento an insolvent debtor who has petitioned this court for the benefit of the several laws of this commonwealth enacted for the relief of insolvent debtors.

An objection has been made to his discharge, on the ground that this court has no jurisdiction. In order to investigate this question with perspicuity and clearness, it will be necessary to bring into view several of the acts of assembly re-

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lating to insolvent debtors, and the act giving existence to this court. By the act of the 14th of February 1729, it is declared that if any person or persons charged in execution for any sum or sums of money, not exceeding in the whole, the sum of one hundred pounds, from and after the 25th day of March in the year of our Lord one thousand seven hundred and thirty, shall be miaded to deliver up to his or their creditors, all his or their effects, toward the satisfaction of the debts, wherewith he, she or they stand charged, it shall and may be lawful for such persons to exhibit a petition to any of the courts of law within the province, from *which the process issued*, upon which he, she or they was or were taken or charged in execution, &c. The first section of the act of February the 7th 1765, enlarges the amount to any sum not exceeding 150l to any one person. This sum is still further enlarged by the act of 3d of April 1794, the first section of which provides that from and after the passing of this act the justices of the Supreme Court and the judges of the several courts of Common Pleas of this state, respectively, shall have jurisdiction and power to discharge from imprisonment all persons who now are or hereafter shall be imprisoned for debts or demands, although such debts or demands exceed the sum of 150l to any one creditor &c. The act of the 4th of April 1798, which is now expired, confined as above the application to the judges of the Supreme courts or to the judges of the court of Common Pleas.

The act constituting this court, contains the following clause to wit : “ That there shall be a court of Record established in and for the city and county of Philadelphia &c. “ which shall consist of a president and two assistant judges, “ any two of them, in case of the absence or inability of the “ other shall have power to try, hear and determine all civil “ pleas and actions ; real, personal and mixed, and for the “ the trial of all such pleas and actions, shall have and exercise the same powers, authorities and jurisdictions as are “ now vested by law in the court of Common Pleas, provided “ that the said court shall have no jurisdiction, either originally or on appeal, except the sum in controversy shall ex-

“ceed one hundred dollars. In the 2d section, it is provided
 “that all suits and causes depending in the court of Common
 “Pleas &c. shall be transferred to the said District court,
 “there to be *heard, tried and determined.*”

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This is a court of limited jurisdiction. Previously to the establishment of this court the judicial power of the commonwealth was vested in the several courts then existing; a portion of that power only has been transferred to this court and it is confined to all civil pleas and actions *real, personal and mixed*, and for the hearing, trying and determining of these, the court has express jurisdiction. If any power should be wanting to carry into effect the power expressly given, that must necessarily be implied, but the court can go no further.

The words of the act of the 22d of May 1728, giving power to the court of Common Pleas are more comprehensive than the words in this Act, they are as follows “shall hold
 “pleas of assizes, scire facias, replevin, and hear and determine all, and all manner of pleas, actions, suits and causes civil, personal, real and mixed.” Yet by virtue of this law, the court of Common Pleas never were considered as authorised to discharge insolvent debtors; it was necessary to pass special acts for that purpose; neither can the words in the constitution, in favour of Insolvent Debtors avail the petitioner, as the manner, is not prescribed by law, so far as respects this court; and supposing for a moment that the words of the Act of 1729, are broad enough to embrace any court thereafter to be created, still we meet with an obstacle in the Act of 1794, in which the application is expressly confined to the Justices of the Supreme Court, and the Judges of the several courts of Common Pleas.

It has been urged in a zealous and ingenious manner, that the most liberal construction ought to be put upon these acts in favour of personal liberty; this argument is always captivating and is in general, correct; yet it is more peculiarly applicable in cases where there is no doubt as to the jurisdiction over the subject matter; besides in the present instance, the power to liberate from im-

1811. imprisonment, must necessarily be accompanied with a power
 The Case of to remand and punish for fraud, it's exercise will also not
 FRANCIS C. only affect the rights of property, but may lay the founda-
 SARMIENTO. tion of prosecutions for perjuries.

Upon the whole, the Court are of opinion that they have no power to discharge an Insolvent Debtor.

SCHOCK against M'CHESNEY.

DAUPHIN County, Nisi Prius, coram Justices YEATES and SMITH, 1805, action on the case; narr, slander; evidence that they were spoken to a Justice of the Peace with a view to a prosecution. Warrant issued, the party brought before the Justice, the ground of suspicion removed, and discharged on examination. Ruled by the court, and the Jury directed, that an action of slander would lie, and damages must be given, motion for a new trial on this misdirection of the court.

This came before the court in Bank at Sunbury 1808, Chief Justice TILGHMAN expressed himself of opinion that it was a misdirection; YEATES and SMITH were of opinion, upon argument that they had misdirected at Nisi Prius, misled by the authorities then cited.

In support of the verdict it had been argued that an action of slander would lie, because an action for a malicious prosecution would not, and that an action for a malicious prosecution, would not lie because *no bill had been sent up to the Grand Jury; that the prosecution must be ended &c.*

Justice BRACKENRIDGE, had drawn up the following note, and expressed himself in favour of a new trial.

I incline to think that in this case there must be a new trial, the court seeming to have been mistaken in the point of law, and which went to the defence on the part of the defen-

dant. It would seem to have been their idea, that because the prosecution, in the course of which the words were spoken, which make the ground of the action, was terminated *short of a bill of indictment*, the prosecutor was not within that protection which the law gives, so as to exclude an action for the words, in which, nothing short of proving the truth of the words, will justify.

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It would seem to have been their idea, that an action for a malicious prosecution would not lie, and that therefore an action of slander might be supported. This is not a mere technical question as to *form of action*; as whether debt or case; but it goes to the merits of the defence. For in an action for a malicious prosecution, reasonable ground, probable cause will justify; and there is the same reason where the prosecution has terminated in the first instance, as at any other stage.

It is true, the prosecution must be ended, for an action would not lie, pending the prosecution. For it cannot yet appear, what probability the accusation may have had, but it depends upon the stage at which it is terminated, whether it be ended on an acquittal or a discharge. If on complaint to the magistrate, the complaint is dismissed, the officer of the law, not thinking there is reasonable ground to issue process, yet the prosecutor is protected under reasonable ground of making the accusation, and of which a jury shall judge if an action is brought. If the charge is so far sustained by the Justice as that a warrant is issued, and the defendant is brought forward, but discharged on examination, yet the accuser is protected under reasonable ground of making the charge; so in every stage of the proceeding. The first step is under the protection of the law, and as much within the reason and policy of the protection as the last. It is not the motive, but the reasonableness of the ground of alleging guilt that is the gist of this case: so that weakness or misconception will not protect, nor will personal ill will and express malice, exclude protection if there is reasonable cause. It is the reasonableness of the ground of prosecution, that the court and jury must look to. This makes all the differ-

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ence in the nature of the defence. What in an action of slander will go to excuse only, will justify here. Had the defendant pleaded this as a special matter, which he might have done, yet upon this opinion of the court, it could not have justified as there had not been an indictment, and on demurrer, the plea must have been over ruled, and so he could not have had the benefit of it.

But I take it, that notwithstanding it might have been pleaded specially, yet it may be also given in evidence under the plea of *non cul*, as that which rebuts the imputation of malice, and the occasion and manner of speaking the words forms a justification being within the protection of the law. The defendant in this case by the misdirection of the court, has not had the advantage of this principle of law laid down to the Jury.

The prosecutor of a public wrong is considered in the light of an informer, as giving information to the proper officer, of an offence committed. The policy of the law will protect such information, where the person appears to have had reasonable ground to entertain suspicion. He is under the protection of the law from the first act, and reasonable ground will justify.

That the prosecution must be ended is certain, but if ended after the first step, it is the same as if ended after the second, or the last; discharged by the justice, or by the prosecutor for the state on *nolle prosequi* or a bill sent up returned, *Ignoramus*, or on an acquittal by a Jury, the prosecution in the whole stage of it is considered as in a course of justice, and is protected by the law where there has been such appearance of guilt, as justified the entertaining suspicion, and will exclude the supposition, or conclusion that the party informing was not acting under an impression of an offence committed, but was making use of the public officer and the cognizance of the law to accomplish his own malice, or that his weakness was such, and credulity that he entertained a suspicion without reasonable cause; for I am as much to be protected from the weak and credulous as from the wicked. The single point of my defence must be, was

there reasonable cause to charge with a crime, and of that, reasonable men must judge. It is a matter of fact and must go to the jury, and in an action of slander, reasonable ground for speaking words, will not justify, it will only excuse; so that it is of the greatest consequence to keep the action of slander, and that, for a malicious prosecution, separate and distinct.

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SUPREME COURT OF PENNSYLVANIA.

Lyon against Fox.

THIS was an action on the case for a malicious prosecution, brought by Patrick Lyon against Samuel M. Fox, Esquire, President of the Bank of Pennsylvania, Jonathan Smith, Esquire, Cashier, John C. Stocker, one of the directors of the same institution, and also one of the aldermen of the City of Philadelphia, and John Haines, late high constable of the said city.

Condy, Hopkinson, Dallas and M. Levy for the plaintiff.

Rawle, Ingersoll and Lewis for the defendants.

The facts will appear in the following charge of Mr. YEATES, who presided at the trial.

At length, gentlemen of the jury, we have reached nearly the end of this tedious but important cause; this action has been instituted by Patrick Lyon against Messrs. Fox, Smith, Stocker, and Haines, and they are attached to answer him in a plea of trespass on the case: the declaration which is filed states the cause of complaint, also the good character of the plaintiff, that he had never been suspected to have been guilty of or concerned in any robbery, burglary, or larceny, or any such crime or offence. Yet the defendants, well knowing this,

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have falsely and maliciously, without any reasonable or probable cause, charged and accused the plaintiff with robbing the bank of Pennsylvania, on the night of the first of September, 1798, and that afterwards, on the 21st of September, in the same year, without reasonable or probable cause, procured him to be arrested, and taken into custody for the supposed offence. That they falsely and maliciously, without any reasonable or probable cause, procured him to be committed to the public jail, where he was detained until December 14th, when he was discharged on bail to appear at the next Mayor's Court, to answer such charge as might be preferred against him.

Also, that the defendants did falsely and maliciously, and without any reasonable or probable cause, on the seventh of January, 1799, prefer a bill of indictment to the grand jury, charging, and accusing him of being concerned with a certain Isaac Davis, in robbing the said bank of 164,000 dollars in bank notes, &c.

Also, that the plaintiff did incite, move, procure, and abet, the said Isaac Davis to commit the felony before mentioned. That the defendants did maliciously strive and endeavour to sustain the same as a true bill against Patrick Lyon, but the grand inquest returned, that the bill against Isaac Davis was a true bill, but as to Patrick Lyon, they returned it *ignoramus*, whereupon, he was in due form of law acquitted and discharged. By means of these prosecutions and wrongs, done and committed by the defendants, the plaintiff has been injured and prejudiced in his good name, fame and reputation, and otherwise damnified, to the amount of 50,000 dollars. The case is now before the jury for their decision.

The git of the question is, did the defendants prosecute Patrick Lyon in the manner set forth falsely and maliciously without reasonable or probable cause. Without this is proved the action cannot be sustained, the jury will bear in mind, that they are not trying the innocence or guilt of Patrick Lyon, but whether the defendants had reasonable cause for suspecting him of being concerned in the robbery at the time they prosecuted him; or whether, that prosecution was not

only unjust but malicious if they had probable cause, they are not liable in damages, nor will malice be inferred. 1811.

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Formerly it was held, that damage must be proved, 'tis not so now, the quantum of damage may be inferred; it is also settled in the law, that on a prosecution without probable cause, malice may be implied; but where there is probable cause malice shall not be inferred, and malice is the pivot on which this cause must turn.

The principle of the law is founded in sound policy, and secures the due administration of justice; calculated for the common safety of the prosecutors and the prosecuted: without this great discouragement will be held out against prosecutions on suspicion. Blackstone is very full on this point, and was cited by the defendant's counsel.

It is of importance to the community, that where offences are committed, the offender should be punished, and this without regard to persons; every one is interested in the common cause, the rich and the poor, the master and the servant are equally affected, the tradesman who depends upon his labour for his existence, is to be regarded as much as any other member of the community. Wealth and respectability of character should not weigh as a feather in the scale, when another man's rights are violated. It is unquestionably true, that in our country at least, we stand upon the rights of man, neither wealth nor office create an unequal standing, or give to any man a superiority over his fellow citizens.

Something has been mentioned, of conversations out of doors; the jury however, will, not listen to any thing they have heard in this way, but they will confine themselves, and form their opinion from the evidence they have heard in this court.

I will not be prolix, yet I must repeat and press particularly on your minds, that malice on the part of the defendants ought to be proved, also, that the prosecution was without probable cause; both these points must be proved and not implied. The fact of malice, must be proved, upon the real guilt, and not pretended guilt of the parties. The court in

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stating the case to the jury, will mark out precisely what express malice is, in it's legal acceptation.

With respect to Mr. Fox, it is urged against him from the part he took in the original prosecution of Lyon, that he was actuated by malicious motives: to this the defence has been set up, that he is justified from the station he held in the institution, being president; and consequently bound to superintend it's affairs. If he did not go beyond the bounds of his duty he would not be criminal, and those boundaries are determined by sound discretion: he may have acted indiscreetly, and it may so appear under all the circumstances of the case, but he has not been guilty of any offence against the civil rights of the plaintiff, unless he has acted without probable cause, and from malicious motives; but if he has acted in this manner, he is liable to Lyon in damages on this action, for a malicious prosecution; now, what is the testimony on this point.

He was present at the examination before Stocker, and upon a *habeas corpus* he appeared also before judge Shippen; he afterwards appeared on a like writ before this court and on all occasions he is said to have been temperate in his manner, so that express malice on those occasions is not proved whether it can be imputed from any circumstances mentioned in the deposition of Lace, who says Lyon was much injured by the suspicion of Mr. Fox, is for the jury to determine.

The deposition of J. Rizer, relates to Mr. Smith, the cashier: the same doctrine laid down in the last paragraph, also applies to his case. But the jury will consider Mr. Rizers' situation; he was extremely indisposed when his deposition was taken; of course his mind could not be in that calm state which he enjoyed when in health; you will observe Mr. Smith, in that deposition, is made to use language, which from all the other testimony, he appears to have been a stranger to. A man of discreet and steady habits is not likely to answer a question, nor upon any certain information to break out in the language attributed to him: Mr. Rizer says to Mr. Smith, that he had seen Lyon; and Mr. Smith said, did you by God! what, has he got out? the deponent answered yes,

and he complains that you have used him cruelly ; Mr. Smith replies, *By God !* we will use him worse ; as if this was not sufficiently wicked, he is made to go on in the same strain of violent language, and says, that the plaintiff might think himself *damn'd* well off, since he had got clear so easy. That after this Mr. Smith continued to threaten the plaintiff, saying, that he was a *damn'd rascal*, and that he should be hunted out of the country ; that they had done his business for him, and that nobody would employ him ; that he had lost the work of the bank and of the directors. Rizer says, that he expected Lyon would sue the bank and make them pay for it, that Mr. Smith answered warmly, *He sue us !!* He cannot sue us, and if he does, we can always have a jury on our side, and at the same time calling Lyon a rascal, scoundrel and the like.

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The probability is, that Mr. Smith did not use such intemperate language but the deponent imputed it to him, when his own mind was not perfectly sound by reason of his sickness.

The next testimony against Mr. Smith, is that of Thomas Cave, it contains little more than a conversation about the robbery of the bank, and an offer on the part of the cashier of 2000 dollars for the apprehension of Lyon ; how far this is a proof of malice will depend on other circumstances.

You have also the testimony of Mrs. Pendergrass, to prove this one point as a corroboration of the deposition of Mr. Rizer, she lived some time with Mr. Smith, and has sworn that she heard him use some harsh epithets when correcting a careless negro boy who lived in his family, that he had called him a *damned scoundrel*, and a *damned little rascal*, that afterwards, he was turned away for bad behaviour, this took place many years ago, and depends altogether upon the correctness of her memory.

So much for the affirmative evidence in sustaining the charge of malicious prosecution, affirmative evidence gentlemen is strong and irresistible, if not impeached by other circumstances. You have other testimony of the conduct and

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conversation of Mr. Smith, given by men of the utmost respectability, who have known him from his early youth and who have been his companions through life, there is Mr. Sanford who declares Mr. Smith never swears, Mr. Annesley, Mr. Robert Ralston and Mr. Inskeep gave similar testimony; Mr. Robert Ralston says, that he has always considered Mr. Smith as an honest and upright man, that in all situations in which he has seen him whether in convivial or friendly parties he had always found him agreeable, and free from passion, that he never heard him use an indecent or illiberal expression, nor did he think that he ever called a person a *damned rascal* or any such like opprobrious term.

Mr. Inskeep says, he has known Mr. Smith a number of years, that he had been in his company almost daily, and seeing him also in his social and convivial moments where he had observed generally his sobriety and civility, he never heard him use a profane or indelicate expression, he never saw him angry.

The error in Mr. Wharton's testimony discovered from the fact sworn by the keeper of the prison, was evidently an unintentional mistake.

From the general course of the testimony it appears, that Mr. Stocker was rather friendly than otherwise, though some parts shew the contrary. Mr. Lace has sworn that he asked Mr. Stocker if they were going to let Lyon out of prison, he answered no, from which he inferred that Mr. Stocker appeared to have changed, as he had before been friendly. The next words were, that he will keep him there as long as he will hang together; these words on the part of Mr. Stocker, if used, in this capacity of minister of justice, are a violation of the duties enjoined upon judges both by our constitution and laws. It is a refusal to do justice without regard to the innocence or guilt of the party. In the case of Morgan against Hews, where a similar complaint had been made it was held that, although the language was warm and resentful, as the threat was not carried into effect it was not deemed sufficient ground for an action of damage for a malicious prosecution. In Mr. Stocker's case several circumstances

are mentioned, he had advised the plaintiff in the mode he had best pursue, in order to procure his enlargement, recommended to him to employ a lawyer and procure a *habeas corpus*. He offered on his part also to go to Germantown and speak to the directors in Lyon's favour. When the witness, saw Mr. Stocker again he said he was informed that the directors had determined to keep Lyon in jail, that was after the plaintiff had been before judge Shippen on the *habeas corpus*, and there Mr. Stocker thought Lyon has trifled with the bank directors.

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With respect to what Haines did, it appears, that he was appointed to serve the process as a constable, this was his duty, and the circumstances of the robbery of the bank should inspire him to be active, he appears to have done nothing more than to have laboured under impressions unfavorable to the plaintiff, on what he considered to be good grounds for his suspicion; but whether the circumstances that were in his knowledge, at the time, amounted to probable cause, is the province of the jury to determine. If there was not probable cause under all the circumstances of the case the jury will determine how far he was actuated in his subsequent conduct by malicious motives.

The jury must carry up their minds to the periods of time, at which the several circumstances took place, in order to form their judgment on the propriety or impropriety of the conduct of the defendants at those periods respectively; for the defendants could not judge at the first period upon facts then unknown to them, but which have since come to light. They are not gods, they are not omniscient, they cannot see what is done in the dark, they can only like other human creatures, draw their inferences from circumstances previously known.

On the 5th day of August, an attempt was made upon the vault door, when the bank was kept in Lodge-alley, as was evident from the grinding upon the stone jamb, and its being forced two inches by an iron crow-bar. On the 7th of August, the bank was removed to Carpenter's-hall, which was thought to be a secure building; the eastern vault is the

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one in which the cash was deposited, the doors of which were carried to Patrick Lyon, it does not appear, however, that this circumstance was explained to him : the work was thought to have been delayed ; the jury will judge whether it was unreasonably delayed or not. The doors were, however, fixed--and on the night of the 1st of September, the bank was plundered—Coldwater was one of the watchmen of the bank, and he has told you that one of the keys was often trusted to Cunningham, that the other was with Mr. Smith ; this circumstance will be duly weighed by the jury, but you must take into view the testimony of Mr. Annesley, who affirms that the evening before the robbery, about four o'clock in the afternoon, the cashier brought him one of the keys and put the other in his pocket, and it was never out of his possession—no person could get into the cash vault unless possessed of both keys—there was no mark of violence on the locks—the jury will, therefore, reflect and determine whether the keys were more likely to be the genuine keys than false ones.

In the report of the bank to the committee of the assembly it is stated among other disclosures made by Davis, that the plan of the robbery originated with Cunningham, *who procured the false keys and that he does not know who made them.* Annesley affirms that he saw the back door open at six o'clock on Sunday morning, at least he found it ajar, he pushed it open and looking into the bank, he saw the cash vault door open likewise, he went round to the front door and rapped hard at it, when Cunningham put his head out of the window, he told him to come down and see what a condition the bank was in. Cunningham came down and unlocked the front door, and they went to the cash vault together, and upon calling in the cashier they discovered, on examination, that the teller's box was perfectly empty, and upon calculating there appeared a deficiency of 160,000 dollars. On this discovery they say the suspicion naturally fell on Lyon, they went immediately in pursuit ; going to Lyon's shop they found it shut, they went to his house, he was not there, and there was a cobweb in the key hole which lulled

suspicion for some time. Yet, Mr. Annesley, a few days after heard some persons in conversation, one of whom mentioned that he had seen Patrick Lyon the day before in the city. Annesley asked him if he knew Patrick Lyon, he said as well as any other man, Annesley asked him his name, he said it was John Boyd and lived in Southwark : after communicating this information to the directors, he was directed to look for Boyd, but it appears that this information was incorrect. However, at the time it was ground for suspecting Lyon.

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It appears that Lyon went with his apprentice to Lewistown ; this apprentice died in that neighbourhood, on the 4th of September. There is a story told, that Lyon on his being suspected, immediately returned, and went on foot from Wilmington to this city, this circumstance is greatly in favour of the defendant, as is also the subsequent story of his travelling into the neck, surrendering himself to Mr. Stocker, where he was in want even of a glass of water, his being left at liberty, and his return the next morning to answer any thing that might be alledged against him ; the jury have heard these facts stated in evidence, and the arguments on both sides on this point, they are therefore well able to form their own opinion, but it is neither proof of innocence or guilt.

The subsequent proceedings are to be the objects of your enquiry. Did the defendants proceed without probable cause ? The human mind cannot act without motives. In this case, did they act without probable cause ? that also is for the consideration of the jury, the subsequent illucidations may shew the plaintiff to be innocent, but did the defendants know it at that time ?

On the 12th of September they had some intimation, that Cunningham the porter might possibly be concerned in the robbery, they examined his house on the same day, but found nothing. Davis, on the 19th November, being in custody of Mr. Fox, the president, and threatened by Mr. Wharton, the then mayor, Davis was induced to give up the residue of money which he had received from Cunningham on the day of his death.

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A *habeas corpus* was obtained for Lyon, to appear before judge Shippen, the idea still remained in Mr. Fox's breast, that Lyon had furnished false keys, on the 14th of December another *habeas corpus* was obtained for Lyon, to appear before the Supreme Court, and every judge on the bench agreed, that under all the circumstances of the case, the defendant should be liberated on bail himself, in 2000 dollars, and two sureties of a 1000 dollars each, which shews, there had been ground for suspecting him. The report of the committee to the house of representatives, is nothing more than a recital of the representation made to them by the officers of the bank, and does not cast any stigma upon the plaintiff, although it contains an expression of their approbation of their conduct for their exertions in detecting the robbers, and recovering the money stolen.

A bill of indictment was sent to the grand jury on 10th of January, and returned by them as *ignoramus* on the 12th. Whether, there was still ground to suspect Lyon, is for the jury to determine, and at what period it ceased; for after all ground of suspicion ceased, the prosecution ought to have ceased likewise.

Every humane mind must feel greatly for the sufferings of the plaintiff, under such unfounded suspicions; but though they now appear to be unfounded, they might not have been considered such at the time they were entertained by the defendants. If there were solid or reasonable grounds for suspicion, the law does not imply malice, and malice is the point in question. In pursuing his remedy, the plaintiff must proceed according to the known and established rules of law; and by them malice is not to be inferred, where there is probable cause. This is now for the jury to determine, whether there was probable cause for suspicion. If there was not, their verdict will go for the damages; and of the amount of damages, they are the sole and exclusive judges—it is a province belonging solely to themselves, and with which the court have nothing to do.

The court will just mention, that any defect there was in the original commitment of the plaintiff to prison, by Mr.

Stocker, was remedied, if not fully, by judge Shippen, it was certainly by the court upon the second *habeas corpus*. They, however, acted only on so much of the case as was at that time exhibited to them ; it did not determine the question of innocence or guilt, but went to the point of probable cause ; and if there had not appeared some reasonable ground of probable cause, judge Shippen or the court would have been then bound to discharge Lyon from confinement.

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The jury gave a verdict for \$12,000 damages.

On motion of the counsel for the defendants a rule was granted to shew cause why a new trial should not be allowed.

A new trial was granted by Judges TILGHMAN and SMITH, whose opinions the reporter has not. The following contains the sentiments of Judge BRACKENRIDGE who dissented ; it is so replete with good sense, as well as law knowledge, that the reporter could not resist the temptation of inserting it in this place.

The ground of this action, a malicious prosecution, is the want of probable cause ; this is not a question of law, nor a mixed question as some term it ; but simply a question of fact. Unless like all other questions arising from facts, it is called a question of law, where, by the pleadings it is put to the court, and the conclusion is left to be drawn by them. This can only be where the action is grounded on a proceeding merely judicial, and set forth in the declaration, and the defendant demurs, as in *Reynolds against Kennedy* (a), or where the demurrer is to the evidence ; or where it is submitted to the court on a motion for a nonsuit, or on a special verdict ; or in arrest of judgment, where the question has not been disposed of, on demurrer to the allegation of the plaintiff, in his declaration.

It does not occur to me to think of any difference in this case, from that of any other ground of action alledged in the declaration, admitted by the pleadings, or specially

(a) 1 Wil. Rep. 232.

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found by the Jury and left to the court to make the inference. It is in this course of proceeding and with this restriction, that it is said, that "What shall be deemed in law to be reasonable, shall be judged, all circumstances considered by the judges of the law, if it comes judicially before them. (a)

With regard to *intention*, we cannot search the heart, and where the matter rests merely upon the want of probable cause, we cannot say what is actually the motive.

It may be *credulity*. "He was too credulous to cause "one to be indicted," says CROKE Justice, in an action for malicious prosecution. (b) It may be *misconception*; even a mistaken notion of what is due to the community. But the safety of the citizen, where the prosecution is groundless, will not admit of so charitable a supposition; and the policy of the law will infer malice.

We are not to understand the word *malice* in that narrow restrained sense, to which the modern use of the word malice is apt to lead one, a principle of malevolence to particulars (c) *mala mens* is opposed to *una mens*, and *malitie*, which from Bracton, and other common law writers, we translate, *malice*. I would define it to be a disposition of mind which works a mischief, whether from *weakness* or *wickedness*.

Where the matter does not rest upon implication merely, but there is evidence of improper motives, it is called *express malice*; proof of this goes to the damages, and makes all the difference between *compensatory* and *exemplary* damages.

With respect to the constitutional effect of the act of a judicial officer, in granting a warrant, on complaint made, or in holding to bail, it can operate only, *quo ad hoc*, or for this particular purpose, and is not conclusive on the ultimate examination by a Jury. It may weigh, and will weigh, but cannot conclude: Nor ought it to weigh always much, unless the circumstances had been all before the judicial.

(a) 2 Inst. 222.

(b) Croke James 193.

(c) Foster 256.

officer, fairly disclosed to him, and the credibility of testimony out of the question. "This case in its nature is more properly the province of the Jury than of any Judge whatever," says Chief Justice Pratt.

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I am aware of what is said in Johnson against Sutton, that the question of probable cause, is a mixed proposition of law and fact; that whether the circumstances, alledged to shew it probable are true and existing, is a matter of fact to be found by the Jury; but whether supposing them true, they amount to a probable cause, is a question of law to be decided by the court. If the meaning here be, that the Jury shall only find the facts, and be restricted from the conclusions, it is incorrect; for the same doctrine was attempted to be established in the case of libel, but did not succeed. That there was a want of probable cause in the case before us, would seem to have been the opinion of the Jury, from the finding for the plaintiff; and, if we look to the damages, we must infer that, in their way of thinking, the malice did not rest upon *implication* merely; but that there was proof of other motives than those of public justice. Taking this to be the case, I do not know what damages I would call excessive.

With regard to the defendants severally, there would seem from the evidence, to have been more than a shade of difference between them; and it was under this impression, at least so far as respects myself, that it was suggested to the Jury, that they might sever, and find for one or more of the defendants, and for the plaintiff against others. But having had the matter all before them, and their attention called to this point, and not having done it, I am not disposed to turn the plaintiff round to a new trial, for this reason, when I consider what we have seen, that the action with respect to the individuals will be but nominal, and that it is a corporate body that will pay the damages.

With regard to the act of Assembly, which it is contended in respect of two of the defendants, entitles them to notice before an action brought, where the action is grounded on any thing done by an officer in the execution of his

1811. office, it would seem to me that it can have no application in this case; where acts *official* are blended with acts *unofficial*, and where there is an alledged participation with others, who are not entitled to notice. The act of limitation for the bringing the action within six months, for the same reason, is inapplicable, even if it had been pleaded; but it has not been pleaded, and without being pleaded, could not be given in evidence. For the plea of *non cul*, does not go, as has been argued, "to the time of the plea pleaded," but, "to the time of the cause of action."

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In refusing a new trial in this case, I conclude with a general observation, that I find myself more opposed, every day, to the idea of granting new trials on the ground of being against evidence. It would seem to me that no mischief or inconvenience would follow, if the power of the court was confined to matter of law, or more sparingly used in matter of evidence. Under this impression, as at present advised, I shall not favour applications for new trials on this ground, and, where there has been no misbehaviour of parties or jurors, or misdirection of the court, and the verdict rests merely on the evidence, I shall not be much disposed to disturb it. *The laws delay*, from a variety of causes in the judiciary arrangement, or the administration of Justice, in this State, has come to be peculiarly a grievance, and a facility in granting new trials on any ground, will but increase it.

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IN this case there was a verdict for the plaintiff, and a rule was obtained to shew cause why there should not be a new trial.

* This Case having been mislaid, was omitted to be inserted in its place.
REPORTER.

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The action was upon a policy of insurance, dated the third day of March 1807. The insurance was upon the commissions of the plaintiff, as supercargo of goods on board of the *Minerva*; on a voyage from Philadelphia to Lagaira, at five and a half per cent on \$5,000, valued at \$7,000. The policy contained the following memoranda: “this insurance is made on commissions, valued, at \$7000, *free of average, and without benefit of salvage.*” The vessel sailed on the 13th of March 1807, and, on her outward voyage, was captured by a British privateer, commanded by John F. Burk, on the 11th of April 1807, and was carried into Curracoa, and there detained upwards of a hundred days, in the possession of the captors. When the vessel had been at Curracoa two months, Burk offered to release her, provided he was permitted to detain six invoices, valued at about \$40,000. This proposition was rejected. A compromise finally took place between Burk and Parker the supercargo, by which Burk fixed on two invoices, as suspicious; one of which was valued at \$6,500, and the other at \$4,750. Parker paid Burk the \$6,500 out of money raised by a sale of part of the cargo at Curracoa, on condition, that Burk would obtain a condemnation of the invoice in nine months, or refund the money. Parker gave his bills of exchange, for the sum of \$4,750, payable on the same condition. In this agreement, which was signed on the 25th of July 1807, it was stated, “that Burk, by virtue of a letter of marque, had arrested, as a prize, the said *Minerva.*” The vessel, being thus liberated, proceeded to Lagaira, and remained there 80 days, during which time the cargo was sold; but the proceeds were less, by about \$3,000, than they would have been, if the vessel had not been captured; in consequence of the arrival of many American vessels, in the mean time, which lowered the market.

Parker gave information of the compromise, by a letter, dated the 18th of July 1807. Evidence was given, that Parker had taken great pains for the benefit of those concerned. It appeared also, that for the goods sold at Lagaira, and for the investments made there, he received a sum of money equal to what his commissions would have amounted to; and that,

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after his return, he received other sums from other shippers, towards expenses &c. The amount he actually received, after deducting expenses, was a matter of considerable controversy at the trial. He was absent about nine months. The voyage is usually performed in about four months. The shippers, who were insured, generally abandoned; none were known of, who did not abandon. The first letter received from Parker, giving information of the capture, was dated the 22d of April 1807; earlier information arrived, but it did not appear that Parker knew of any opportunity by which he might have given information sooner. There was no evidence of the time John Halowell, the agent of Parker, received his information of the capture. An abandonment was made by Halowell on the 15th of July 1807, according to the usual custom. Halowell testified, that Parker left the superintendence of his affairs with him; that he acted as his agent; that the abandonment was not made in consequence of any particular direction of Parker; but by virtue of his *general agency*. The above are the most prominent features of the cause; there were other circumstances, but of little weight.

The court were of opinion that the owners of the cargo had a right to abandon, and claim a total loss; and, as the interest of the plaintiff was so inseparably connected with the cargo, it was taken for granted, that he had a right to make his election at the same time.

HEMPHILL, President, gave the following opinion.

The principal questions which have arisen, are,

1st. Whether, under the circumstances of the case, and the true construction of the policy, the plaintiff had a right to claim from the defendant, the whole amount insured, without deducting the sum of money which he received after the abandonment.

2ndly. Whether the abandonment was made by a person having sufficient authority.

3rdly. Whether it was made during the continuance of the total loss, and within the time prescribed by law, and

4thly. Whether any thing occurred to waive the plaintiff's right to call upon the underwriter for a total loss.

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The words in the memorandum, "*free of average and without the benefit of salvage*," are seldom met with, and not much light can be collected from the authorities, to assist in making a proper application of them to a policy of insurance on commissions. No evidence has been exhibited, to shew that there is any usage, or general understanding, as to their meaning, when applied to a case like the present. In giving a construction to the clause two principles must be respected; the one is, that an insurance is a contract of indemnity; and the other is, that men ought to be bound by their contracts. The clause "*free of average and without the benefit of salvage*," is to be found in the case of *Pond against King* (a); in the case of *Spencer against Franco* (b); in the case of *Kulen Kemp against Vigne* (c); and in a few other cases; but in none of those cases, did the question before the court turn upon the meaning of this clause. In the case of *Pole against Fitzgerald* (d); the court speaks of the case of *Pond against King*, but not in a manner altogether satisfactory. Besides, in a note (e) it appears, that there was a particular clause in the policy that is not in the present, "that in case the ship should not be heard of in twelve months, after the expiration of the said three months, (the time mentioned in the policy) the underwriters agreed to pay the loss; the insured to repay the money, in case the ship should be afterwards heard of in safety." So that upon the whole of that policy, the insured was not to take any benefit from the salvage, or thing saved.

There does not appear to have been any decision resembling the particular point now before the court. The words "*free of average, and under a certain per centage, unless general*," are frequently used; and are well understood. They refer to the underwriter, and if the exception, unless general, is omitted, the words "*free of average*," must ne-

(a) 1 Wil. rep. 191.

(b) Park on Ins. 75.

(c) 1 Term rep. 304.

(d) Willes rep. 648.

(e) Ibid.

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cessarily include *general* and *particular* average. This point has been decided in the Circuit Court of the United States, in the case of *Coster against Phoenix Insurance Company* (a). It appears clear to the court, that the words "free of average," refer to the underwriter, and are intended for his advantage. And, by a fair construction, the other part of the clause, also refers to him; by which he relinquishes any benefit to be derived to himself from the salvage. In *wager* policies, the words "free of average and without the benefit of salvage," are usually inserted, and, although a *wager* policy differs materially from a policy on *commissions*, yet it may help to explain the meaning of the words, "without the benefit of salvage," and to shew, that they refer to the underwriter. In *2d Cond's Marshall* (b), the author, in speaking of a *wager* policy, says, that "the parties mean to play for the whole stake; and, when an underwriter pays, a total loss, he cannot, as in the case of insurance upon interest, claim any benefit from what may have been saved; and, to preclude any claim of the sort, the words "*free of average and without benefit of salvage*," are always introduced.

That the words refer to the underwriter can further be collected from the memorandum inserted in *respondentia* contracts (c). To guard against what was said to be the opinion of Lord MANSFIELD, that there was neither average nor salvage on *Bottomry* contracts, the lenders on *respondentia* contracts have introduced into their Bonds the following clause; "it being first declared to be the mutual understanding and agreement of the parties to the contract, that the lender shall be liable to average and entitled to the benefit of salvage, in the same manner, to all intents and purposes, as underwriters on a policy of insurance are, according to the usage and practice of the city of Philadelphia." The case of *Appleton against Crowninshield* (d) was relied upon by the defendant's counsel; but, upon a careful examination of the case, it will be found, that it

(a) 2 Cond's Marshall 547.
(b) 121.

(c) 1 Bin. rep. 405. *Gibson v. Philad. Ins. Co.*
(d) 3 Mass. rep. 443.

makes nothing in his favour. From the circumstance of its being questioned whether an abandonment was necessary or not, and from the resemblance that this policy was said to bear, in that respect, to a wager policy, it was insisted, that to entitle the plaintiff to recover, there must be a *final* or *total* loss. But that would leave the policy destitute of reciprocity; and a want of mutuality is a want of justice. In *wager* policies there can be neither *salvage* nor *partial* loss; but the subject matter of the present insurance was capable of a *partial* loss, in various ways: And the parties, by applying the clause to the nature of the thing insured, must have expected mutual advantage. By the first branch of the clause the insured relinquishes all claim of a partial loss; and by the last, according to the construction contended for, he could gain nothing; as there can be no salvage where there is an absolute or final loss.

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The line appears to have been accurately drawn between wagering policies and policies on interest. In wagering policies there need be no abandonment; and a temporary capture, with a subsequent recovery, or arrival at the point of destination is not a total loss. But a temporary capture, in the case of an interest policy, is a *total* loss, if the insured chooses to abandon, during the continuance of the restraint. In a policy like the present a temporary capture, occasioning but a short delay, and no material injury, would operate to the advantage of the insured, if he could perform what may be deemed necessary to fix the underwriters, during the peril.

But whatever the actual intentions of the parties may have been, upon the happening of such an event the expression of Judge BULLER (a), would be entitled to much weight. The court are to "look at the instrument and see what they have done; and, if they have not expressed their intentions upon the policy, the court cannot help them; and they must remain bound by their contract." On the other hand, it is again to be observed, that in the case of an average loss, however great, the underwriter is exonerated from

(a) 1 Term rep. 309.

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liability ; and in this case an average loss would have been sustained, to a certain degree, if there had been no abandonment. And in addition to this the plaintiff had been detained, in consequence of the capture, as long as the usual time of two voyages. Regarding therefore the insurance merely as an indemnity, the plaintiff is not without equity. Perhaps the parties were not fully apprized of the whole effect of the clause in the memorandum ; but, under the terms of the policy, and the circumstances of the case, this court can discover no principle upon which the underwriter is entitled to the earnings of the supercargo, after his abandonment.

But 2ndly, as to the abandonment being made by a person having sufficient authority. The point of fact, submitted to the jury at the trial, was, whether Halowell's agency extended to the commercial concerns of the plaintiff, as it had been contended, that he had only the superintendence of his domestic affairs. The court inclined to the opinion that a general agent had a right to abandon ; but gave no express decision. The court cannot say, that the jury have gone contrary to the evidence, in believing that Halowell's agency extended to the commercial concerns of the plaintiff. The term of " general agency " is more peculiarly appropriated to commercial concerns, than any other ; and the court think, that enough can be collected from the case of *Wolff* and others against *Horncastle* (a), and the case of *Dutilh* against *Gatliff* (b), to shew that a general agent has a right to abandon, indeed it requires a restriction of his *general* power to deprive him of the right of abandoning. The act of the agent, within the scope of his authority, binds the principal.

An objection was raised, on account of the agency being created by *parol* ; but no case was adduced to support the objection. Upon general principles, no writing was necessary ; and no satisfactory reason being assigned to form an exception, in this case, the court must deem a *parol* authority to abandon sufficient (c).

(a) 1 Bosan. and Pull. 316.

(c) 3 Bin. rep. 450.

(b) 4 Dall. rep. 447.

3rdly, Was the abandonment made during the continuance of the total loss? It is now settled, that the right of the insured to recover for a total loss, must depend on the actual state of the fact, as to the loss, at the time of abandonment; and not on the knowledge of the parties (a). And the insured should not only prove the loss, but the continuance of it, to the time of the abandonment.

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In this case, the abandonment was made on the 15th of July 1807. The letter of the plaintiff, which gave notice of the arrangement with Burk, bore date the 18th of July, and the articles of agreement, by which the vessel was liberated, was signed on the 25th of July. There was also some parol evidence on this point. Newcomb testified that he was not informed of Burk's intention to deliver up the property, until two or three days before the written agreement; and that the plaintiff did not raise the funds, to pay Burk, until the 22d of July. From the letter that gave the information, it rather appeared, to have been a recent transaction. It cannot be considered in the light of a decree of restitution, where the parties would be entitled to process to obtain possession; the peril could not be said to be over, even on the 18th of July; it depended on circumstances, and upon the capricious will and pleasure of Burk. The jury, upon the evidence, might reasonably have inferred, that the peril was not over. The insured is not bound to make positive proof; but like every other fact, the conclusion is to be drawn from the whole evidence.

As to the abandonment being too late, it did not appear when Halowell received his information of the capture. The abandonment was made within five or six weeks after such information *might* have been received. The plaintiff might have supposed that, under the terms of the policy, no formal abandonment was necessary. His agent acted with more caution; but there was nothing in the conduct of either, that looked like calculating on events. Indeed, from the terms of the policy, such calculation was out of the question. As

(a) 2 Condry's Marshall 578.

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to the plaintiff, he mentioned on the spot that he was insured and might come home, but that he did not like to see so much property sacrificed. He might have conceived it to be his duty to stay and attend to the cargo, without relinquishing the idea of considering the underwriter as liable to him. This supposition may at least have some weight in accounting for the want of an earlier attention to the abandonment: It is now settled that the state of the fact, at the time of the abandonment, is to be the criterion, and if the abandonment is not made *during the peril*, there can be but a partial loss claimed. An abandonment, in this case may, have been necessary to fix the rights of the parties, and to protect the insured against the technical, total loss, being changed into a partial loss, (in which case, he was to have no advantage under the policy,) the court is inclined to think, that a notice would have been sufficient; but it is not necessary to determine this point. If an abandonment was necessary it could not be for the usual purpose of vesting the property, or right of salvage in the underwriter. This was precluded by the terms of the policy. As to the time of the abandonment, the rule is, that it is to be made in a *reasonable* time; and the principal reasons of the rule are, that the underwriter shall have an early opportunity of looking after the property saved; and, to prevent the insured from calculating on events, and treating it as a total or partial loss, as may best answer his interest. From the cases here referred to (a) it is difficult to say what is a reasonable time, under particular circumstances. It must rather be considered as a mixed question of law and fact; for the jury to determine, under the direction of the court. It would be more convenient if the court could lay down the rule of law, with certainty, leaving it to the jury simply to find the fact. In the case before the court, there is no inducement to limit the abandonment to a very short period; the principal reasons for

(a) Condry's Marshall 590, 593, 599.
4 Dall. rep. 272.
2 Cain's rep. 253.
3 Cain's rep. 250.
9 East's rep. 283.

1 Mass. rep. 264.
4 Dall. rep. 447.
1 Term rep. 613.
4 Mass. rep. 669, 670.

hastening the abandonment do not exist. There was no property for the underwriter to look after : and delay must operate in his favour, as the peril in the meantime might cease ; neither could the case present any motive to the insured to lie by, and calculate on events. Under the terms of the policy, and the circumstances of the case, the court cannot say, that the abandonment was unreasonably delayed.

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4thly, Was there any waver of the claim of a total loss ? With regard to this, the case of Dutilh against Guetliff, is in some respects similar. In that case one of the owners was on the spot, and gave intelligence, from time to time ; but no particular instructions to abandon ; after the vessel was restored she proceeded on her voyage ; but the court said, that they could not presume that any of the owners acted in a manner inconsistent with the abandonment made by their agent. So, in the case before us, the court cannot say, that the conduct of the supercargo was inconsistent with the abandonment made by his agent. The vessel proceeded, after she was liberated ; and the business was transacted according to the usual practice ; which, is in general, for the advantage of all concerned.

New trial refused.

IN THE COURT OF COMMON PLEAS,

OF THE FIRST JUDICIAL DISTRICT.

GOLDING *against* EYRE.

THIS cause came before the court on a demurrer to evidence. It was an action brought by the plaintiff to recover from the defendant, who was the executor of his wife's father, and her trustee, one years interest on a legacy of four hundred pounds, devised to the plaintiff's wife, by her father, the defendant's testator.

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The testator lived and died in the State of New-Jersey. He died December 12th 1806. His will was in these words.

“I Joseph Kay in the township of Waterford, in the County of Gloucester, in the State of New Jersey, yeoman, being sick and weak in body, but of sound disposing mind and memory, do this twenty-first day of February in the year of our Lord one thousand eight hundred and five make and publish this my last will and testament in manner and form following that is to say :

First, I do will and order that my funeral expences and all my just debts be fully paid and satisfied out of my personal estate by my executors hereinafter named.

I give and devise unto my son Aaron Kay all that, my tract of land, begining at a stone in the old road leading to Moorestown, thence by James Hartley and Sarah Middleton's land, until it intersects the north branch of Cooper's Creek, thence down the middle of the Creek to the Fork, thence up the south branch and by lands late of John Gill and Jesse Ellis to the aforesaid old road, thence up the road to the beginning stone, to hold to him during his natural life and then to the heirs of his body lawfully begotten, forever. I further give and devise unto my son Aaron Kay his heirs and assigns forever, thirty acres of Woodland to be surveyed off the head of my plantation by a line parallel with Samuel Stokes' line. I give and devise unto my son Joseph Kay and his heirs and assigns forever, all my cleared land adjoining on the road leading to Borton's Mill and adjoining Andrew Caldwell's land, and thirty acres of Woodland, to be surveyed off, adjoining the above cleared land. And also all my meadow ground and hill side which I bought of Elizabeth Hinchman and Isaac Ellis, which lies above the new Moorestown Road. I give and devise unto my son Charles Kay and to his heirs and assigns forever all my dwelling house and land where I now live, bounding on the old road leading to Moorestown by land of Andrew Caldwell and Matthias Kay and including my meadow in Newtown. Also, all the remainder of my Woodland, which will lie between the lots herein before given to my sons Aaron and Joseph, and

my lot of land which I purchased of Wallace Lippincott in 1811.
Waterford and also, all my Cedar Swamp Land in the Coun-
ty of Gloucester.

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I give and bequeath unto my daughter Rachel, the interest of four hundred pounds, to be paid her annually during her natural life, and at her decease, I give the same four hundred pounds equally between all her children. I give and bequeath unto my daughter Elizabeth, the sum of four hundred pounds. I give and bequeath unto her two children Maria and Sarah the sum of one hundred pounds a piece.

I give and bequeath unto my grand daughter Ann Eyre, she being the daughter of my daughter Sarah deceased, three hundred pounds. I give and bequeath unto my son Joseph the sum of three hundred pounds. I give and bequeath unto my son Charles the sum of two hundred pounds.

All the residue of my personal estate whatsoever, I give and bequeath unto my daughter Elizabeth and my sons Joseph and Charles to be equally divided between them, share and share alike.

I do will and order that the several foregoing legacies given to my children and grand children in their minority shall be placed out at interest, at the end of one year from my decease and to be paid them with the interest thereon arising as they attain to age (that is to say) to the females, at the age of eighteen years, and the males at the age of twenty-one years."

The question before the Court was whether the plaintiff was entitled to receive from the executor, interest on this legacy, for the first year after the testator's death.

W. Smith and Hallowell, for the defendant, contended, that by the Laws of England, of Pennsylvania and of New-Jersey an executor is allowed one year to settle his accounts, before he can be charged interest for any money which comes into his hands as executor (a).

They admitted, that in case of a devise of lands the devisee comes into possession immediately; but in case of

(a) Toller on Ex'rs. 245. 252. 4 Bac. Abtr. Giul.'s Ed. 434. 2. Bioren's ed. Laws of Penn. 57. Griffith's treatise, Laws New Jersey 175. 194.

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bequests of personal estate, the law allows the executor one year to settle his accounts before he is obliged to pay any legacy.

The clause in this will, which provides that the money devised to his children and grand children in their minority shall, after one year, be put out at interest shews, that it was the testator's intention that his executor should have one year to settle his accounts as executor.

S. Shoemaker, contra, answered, that it was the evident intention of the testator to make this 400*l* a fund for the support of his daughter, and if the interest was not to commence immediately from the testator's death, she could receive no support from that fund, 'till the end of two years after his death; as the years interest is not to be paid in advance, but at the end of the year; which, according to the construction contended for on the other side, would only commence in one year from the death of the testator: and his daughter must, during the whole of those two years, be without support.

Where no time is mentioned for the payment of a legacy, it is payable immediate on the testators death. (a)

PER CURIAM.

RUSH, PRESIDENT.

On the trial of the cause of *Golding against Eyre*, executor of Joseph Kay, there was a demurrer to the evidence, and a question has been since presented to the Court, founded on a clause in the will of Kay, in which he devises to his daughter Rachel, the interest of 400*l*, to be paid her annually during her natural life. She was at that time, married to *Golding*, a seafaring man. It is agreed that there are assets to pay the demand, and that Rachel was of age and married, at the time of the devise. The point submitted to the Court is, whether she is entitled to interest on the 400*l*, at the expiration of the first year after the death of the testator? It will

(a) Fonb. on Eq. 370. 454.

be proper to state the will at large. His honor here read it as above.

1811.

GOLDING
against
BYER.

Every body knows, that in deciphering the intention of a testator, the whole will must be inspected, and that every word capable of a meaning should receive it's proper interpretation. In the latter part of the will now under consideration, the testator says, that the several foregoing legacies, given to his children, and grand children, in the minority, shall be placed out at interest, *at the end of one year*, from his decease, to be paid them, with the interest thereon arising, as they attain at age ; that is to say, to the females at the age of 18, and to the males at the age of 21 years. Rachel, not being in her minority, this clause has no other operation than to afford the strongest ground to believe, that the testator intended an immediate provision for *her*. The word *annually* unequivocally shews, that he intended she should derive a benefit under the will, at the *end* of the year. As the court cannot reject *this* word, neither can we substitute, in it's stead, the word *biannually*, which must be done, in order to decide, that she can receive nothing under this bequest, until after the expiration of ~~two~~ years.

It is admitted, that the general rule is, that interest is not payable on a legacy until the end of a year after the death of the testator. But this rule does not extend to cases where legacies are given by a father to his legitimate children ; because, as Lord Hardwicke says (a), “ if the child “ should die within the year, it would have no maintenance ; “ nobody would expend money for it, and if he did, he would “ lose it.” In Hard's Vez. (b), the law upon this subject is fully and clearly stated. Interest commences in all cases from the death of the testator, where specific legacies are given, or where a legacy is given generally, to a child, whether by way of portion or not, in order to create a provision for it maintenance. Even where a legacy is payable at a certain age, and the child is not otherwise provided for,

(a) 1 Vez. 211.

(b) 1 Vol. 308. Beckford vs. Tobin.

APPENDIX.

1811. courts have gone so far as to allow interest, for it's support
in the mean time, before it's arrival at the age mentioned in
the will. We are of opinion that judgment in this case be
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EYRE

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* A writ of error was taken to the Supreme Court where the above judgment was affirmed. See 5 Bin. rep. 472.

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2. The 11th section of the arbitration act was intended to prevent a party from withholding from the arbitrators, evidence which he had in his possession at the time of the arbitration. *ESTANSON v. DUPUY.*

3. On a rule for a new trial the court rejected the depositions of witnesses, taken immediately after the trial, produced to explain and qualify the evidence they gave at the trial. *HERR v. SLOUGH.*

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1st That *C.* the plaintiff could not recover on a special count charging *B.* with endorsing the note by the name of the fictitious payee.

2ndly. That the plaintiff could recover on a count for money had and received.

3rdly. That if the jury believed there had been a fraud practised, the statute of limitations began to operate only from the time of its discovery. *MUSSEY v. LORAIN.* 56

2. The sheriff having made a levy by virtue of a *fi fa*, for costs, delayed further proceedings thereon until after the return day, when another *fi fa* against the same person being placed in his hands, he levied on the same property, *subject to the prior levy.* The first execution was preferred. *RELIGIOUS SOCIETY, &c. v. HITCHCOCK.* 333

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6. In a *joint* action of trespass against three defendants, no issue was joined as respected *one* defendant, the jury found the defendants *jointly* guilty, but severed the damages, the defendant with whom issue was not joined, filed a paper stating, "that he had no intention of continuing the suit, that he had no wish for a new trial, and that he was ready to pay the costs and damages:" The court refused to arrest the judgment, on the application of the other defendants *Ibid.*

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4. *Quere.* If a *scire facias* is the proper remedy to recover the amount of a mechanic's bill when the lien is filed within two years from the commencement of the building, but after six months from the time of the debt contracted. *Ibid.* *id.*
5. A person claiming as a lien creditor under the act of the 17th of March, 1806, had filed no lien nor commenced any suit within six months from the time of performing the work, but had instituted a suit and obtained a judgment within two years from the commencement of the building; the building and lot were sold after the expiration of two years from the commencement of the building, and it was held that he had no preference over the general judgment creditors. CORNELIUS v. UHLER, - - - 229
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- But, Quere,* and see the case of the OLYMPIC THEATRE. - - - 275
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9. Nor is any lien created for work or materials to repair a building. *Ibid.* *id.*
10. But if the principal part of a building is

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- torn down and rebuilt, this is a construction within the meaning of the acts of assembly. *Ibid.* - - - *id.*
11. So if the gable end of a building is torn down and a new building is erected adjoining on that side and opening thereto, the workmen employed and material men furnishing materials to such new building have liens on the new building, but not on the old one. Whatever is a necessary accessary to the enjoyment of the inheritance is subject to the lien ; as the permanent stage in a Theatre ; But the moveable scenery and flying stages are not. It is a principle in equity that a person having two funds shall not by his choice disappoint another having only one. *Ibid.* *id.*
12. Therefore, where the gable end of an old building erected on one lot was torn down and a building was erected adjoining and opening thereto on another lot, the court directed two mortgages which were given on the lot previously to the commencement of the new building to be paid out of the proceeds of the first lot leaving the value of the building on the second lot for the lien creditors, together with the lot itself if the court should finally be of opinion that the lot was liable to the mechanic's liens. *Ibid.* - - - *id.*
13. A man by his will gave his executors power to sell as much of his remaining lands as should be sufficient to pay his debts.— Instead of selling, an arrangement was made between the executors and the residuary devisees, by which each devisee was to have his part upon paying his proportion of the debts. The court were of opinion that the debts remained a lien on the premises longer than seven years, notwithstanding the 4th section of the act

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3. This statute is founded in <i>good policy</i> . <i>Ib. id.</i>	
4. And also in <i>honesty</i> . <i>Ibid. id.</i>	
5. An <i>acknowledgment</i> to take a case out of the statute of limitations must be such an one as is consistent with a promise to pay. <i>ib. id.</i>	
6. Any thing which is added to an acknowledgment going to negative a promise or acknowledgment must be considered as qualifying every other expression, and as the whole must be taken together, it amounts to a refusal to pay, which can never be construed into a promise to pay. READ v. WILKINSON in note to GUIER v. PEARCE. <i>Appendix.</i>	15
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10. The court will not, after a regular judgment, interfere, to give a defendant an opportunity of pleading the statute of limitations, upon a *general* affidavit of defence; but if he will, upon oath, declare the nature of his defence, and swear that the sum claimed was actually paid, or in any way settled and accounted for, they will not restrict him from pleading the statute. *DUTIEL v. MILLER.* - - - 311

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3. The court refused to grant a new trial, where the defendant, having made an assignment, his assignee received the notice of trial, but did not forward it to the defendant. *MUSSEY v. LORAIN.* - 99

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5. No verdict ought to be allowed to stand by which the plain and obvious principles of law have been violated. *Ibid.* *id.*

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1st. *C.* the plaintiff, could not recover, on a special count, charging *B.* with endorsing the note by the name of the fictitious payee ;—
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6. <i>Quere</i> if the bail is thereby discharged. <i>Ibid.</i>	<i>id.</i>
7. Before special bail is entered, the defendant may be considered in court for some purposes. <i>Ibid.</i>	<i>id.</i>
8. He may move for a rule on the plaintiff to show his cause of action, or he may obtain a rule to take depositions. <i>Ibid.</i>	<i>id.</i>
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16. Issue was joined on the pleas of <i>non assumptit</i> , and payment, and notice of set off, when the jury had agreed on their verdict, the prothonotary called the plaintiff, who answered, the jury found for the defendant, but having neglected to calculate the interest, they retired again to make the calculation; when they returned the plaintiff insisted on suffering a <i>non suit</i> , but the court held that the defendant had the right to take the verdict. <i>LAWRENCE v. BURNS.</i>	60
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21. If a freeholder joins with one who is not exempted from arrest in the commission of a joint trespass, the court will not abate a writ issued against them jointly. <i>FIVE V. KEATING.</i>	135
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2. But the judge may ask such further questions as shall be necessary to satisfy his conscience. *Ibid.* - - - - - *id.*
3. When the affidavit is not positive the judge may at his discretion hold to bail. *Ibid.* - - - - - *id.*
4. Where satisfaction cannot otherwise be obtained, counter affidavits may be received. *Ibid.* - - - - - *id.*
5. When the evidence is from a foreign country, founded on a paper duly executed by the defendant, and certified, &c. the judge may at his discretion hold to bail. *Ibid.* - - - - - *id.*
6. No affidavit from a foreign country, unaccompanied by a writing executed by the defendant, shall be sufficient to hold to bail, unless it be proved that the defendant acknowledged the demand. *Ibid.* 5
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8. The court at their discretion will hear supplemental affidavits. *Ibid.* - id.
9. No order of sale shall be made in a foreign attachment, unless there is an affidavit that the debt is just. *Ibid.* - 6
10. No dilatory plea shall be received unless verified by an affidavit or probable cause is shown to induce a belief that it is true. *Ibid.* - 7
11. Depositions taken under a rule of court not to be admitted, if the witness lives within the state and within forty miles, unless the witness has been subpoenaed or could not be found. *Ibid.* - 9
12. On hearing a motion, or application, after a rule to shew cause has been granted, no *ex parte* affidavit to be read. *Ibid.* 11
13. In all actions of debt or contract the defendant to make an affidavit of defence on or before the second Monday of the second term ; provided the declaration be filed on or before the third day of the first term or judgment to be entered. - 10
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- ARGUMENT. 1. In all law arguments, the counsel shall deliver to the court a statement of the points in controversy, two days before the argument. *Ibid.* - - - 12
2. Upon neglect to do so the party shall not be heard. *Ibid.* - - - *id.*
3. In all cases except rules to shew cause of action and to dissolve foreign attachments the party who obtains the rule to begin and conclude. *Ibid.* - *id.*

- ARREST OF JUDGMENT. } 1. All motions in arrest of judgment are to be made within 4 days, unless in causes tried within the last four days of the term, and in that case they must be made before the term ends. *Ibid.* - - 11

- ATTACHMENT. 1. In foreign attachments no special bail to be entered without notice. *Ibid.* *id.*
2. No order of sale shall be made in a foreign attachment, unless there is an affidavit that the debt is just. *Ibid.* 6

- ATTORNEY. 1. Persons applying to be admitted to practice as an attorney must be examined, &c. *Ibid.* - - - 1
2. Must have served a clerkship for three years. *Ibid.* - - - *id.*
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4. Attornies of New-Jersey, Delaware or Maryland, may be admitted at the discretion of the court. *Ibid.* - - *id.*
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8. All agreements of attornies, touching the business of the court shall be in writing. *Ibid.* - - - - - 3
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10. The order of speaking when there are 3 or more counsel of a side. *Ibid.* - *id.*
11. When only two. *Ibid.* - - *id.*
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1. On writs of capias where no bail is required, a copy of the writ must be served, and the defendant must subscribe a direction to enter his appearance. *Ibid.* 3
2. The same to be done where common bail is ordered by a judge. *Ibid.* - 4
3. The manner of giving notice to the plaintiff to shew cause of action before a single judge, shall be by citation, signed by the judge. *Ibid.* - - - - - *id.*
4. A rule to shew cause of action must be moved for within the first week of the term. *Ibid.* - - - - - *id.*
5. In shewing cause of action, if there is a positive affidavit of a real subsisting debt, no counter affidavit will be received. *Ibid.* - - - - - *id.*
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8. Where satisfaction cannot otherwise be obtained, counter affidavits may be received. *Ibid* - - - - - *id.*
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10. No affidavit from a foreign country, unaccompanied by a writing executed by the defendant, shall be sufficient to hold to bail, unless it be proved that the defendant acknowledged the demand. *Ibid.* 5
11. A positive affidavit made in another state and duly certified, shall have the same force and effect as if made in this state. *Ibid.* - - - - - *id.*
12. The court at their discretion will hear supplemental affidavits. *Ibid.* - - - - - *id.*
13. Special bail to be entered within six weeks. *Ib d.* - - - - - *id.*
14. If special bail is entered before the expiration of six weeks the plaintiff may except within twenty days after the six weeks. *Ibid* - - - - - *id.*
15. The defendant may justify his bail within eight days after notice ; giving twenty four hours notice of the time and place. *Ibid.* - - - - - *id.*
16. If special bail be entered after six weeks, but before the succeeding term, it must be excepted to within the first four days of the term. *Ibid.* - - - - - 6
17. If special bail be not entered before the succeeding term, it shall not be entered without notice or agreement. *Ibid.* *id.*
18. After taking an assignment of the bail bond the plaintiff shall not have a rule to

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2. They may also be taken at the settlement of the docket. <i>Ibid.</i>	<i>id.</i>
3. Or upon application to the court. <i>Ibid.</i>	<i>id.</i>
4. The court may enlarge the time to declare and plead. <i>Ibid.</i>	<i>id.</i>
5. The time of filing declarations or pleas marked in the docket. <i>Ibid.</i>	<i>id.</i>
DEFENCE. 1. In all actions of debt or contract the defendant to make an affidavit of defence on or before the second Monday of the second term ; provided the declaration be filed on or before the third day of the first term or judgment to be entered. <i>Ibid.</i>	10
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2. A rule to take depositions is of course. <i>Ibid.</i>	10

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2. On hearing a motion, or application, after a rule to shew cause has been granted, no *ex parte* affidavit to be read. *Ibid.* 11

EXCEPTION. 1. If special bail be entered after six weeks but before the succeeding term, it must be excepted to within the first four days of the term. *Ibid.* - - - 6

2. Upon reports of referees, exceptions are to be filed within four days. *Ibid.* 13

3. The party taking the exceptions to furnish the court with a copy. *Ibid.* *itt.*

EXECUTION. 1. No execution to issue upon a report of referees until after four days notice. *Ibid.* *id.*

2. Upon judgment being entered for want of an affidavit of defence execution to be staid according to the provisions of the act of the 21st of March, 1806. *Ibid.* 11

JUDGMENT. 1. All motions in arrest of judgment are to be made within four days, unless in causes tried within the last four days of the term, and in that case they must be made before the term ends. *Ibid.* - - - *id.*

2. In all actions of debt or contract the defendant to make an affidavit of defence on or before the second Monday of the 2nd term: provided the declaration be filed on or before the third day of the 1st term, of judgment to be entered. *Ibid.* 10

3. An inquisition to ascertain the damages to issue. *Ibid.* - - - *id.*

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2. Under the general issue with leave to give the special matter in evidence or to justify ten days notice of the matter intended to be relied on to be given. *Ibid.* 2

3. This rule does not apply to slander, and assault and battery, unless demand is made of the special matter. *Ibid.* - - *id.*

ISSUE. . . . 1. Under the general issue with leave to give the special matter in evidence or to justify ten days notice of the matter intended to be relied on to be given. *Ibid.* *id.*

2. The prothonotary is empowered to put a cause at issue entering a replication or other pleadings, after plea pleaded. *Ibid.* 7

3. The party may alter it giving notice. *Ibid.* *id.*

MONEY. . . . 1. The practice under the 4th and 5th Ann chap. 16, as settled in the king's bench at the time of the revolution, prevails as to bringing money into court. *Ibid.* 12

2. The prothonotary allowed one per cent. where the sum does not exceed £ 100, 1-2 per cent. on all exceeding that sum. *Ibid.* - - - *id.*

NEW TRIAL. 1. All motions for a new trial to be made within four days, unless in causes tried within the last four days of the term ; in that case they must be made within the term. *Ibid.* - - - 11

2. No motion shall be made for a new trial after a motion in arrest of judgment. *Ibid.* *id.*

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and
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1. If security for costs is not entered when ordered, a non suit to be entered. *Ibid.* 6

2. A non pros may be taken for want of a declaration, which the court may at their discretion take off. - - - 7

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3. The court or a judge may enlarge the
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SHERIFF. . . 1. No sheriff's officer permitted to enter
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SET-OFF. . . 1. When a set-off is intended, under the gen-
eral issue, ten days notice to be given. *Ibid.* 8

SPECIAL JURY. 1. The prothonotary to furnish a list of the
special jurors to each side 15 days before
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and place of striking the same. *Ibid.* 9
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- SHERIFF.** . 1. Replevi. will lie against the vendee of the sheriff for goods levied on and sold by virtue of an execution. **HUBER v. SHARCE** - - - 160
- SLANDER.** . 1. The district court for the city and county of Philadelphia hath jurisdiction in all cases of slander, where the damage laid in the declaration exceeds one hundred dollars, without regard to the amount recovered. **STRUTZER v. MORGAN.** 38
2. In an action of slander, where the words were not actionable in themselves, but were laid as having been spoken of a man's *trade* or *calling*, the court refused to allow the declaration to be amended, after the jury were sworn, by altering the *trade* laid in the declaration. **THACKARA v. CURREN.** - - - 246
3. An action of slander will not lie for words spoken to a justice of the peace, with a view to a prosecution. **SHOCK v. M'CHESNEY. Appendix.** - - - 64
- STATEMENT.** 1. The 5th section of the act "to regulate arbitrations and proceedings, in courts of justice," which requires a statement to be filed, applies as well to the suits substituted by an attorney as those brought by a party without the intervention of an attorney. **M'CARNEY, &c, v. M'CANN.** 40
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- STATUTE.** 1. In an action for a statute penalty, by an informer, the general rule is that the fact

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3. If a justice of the peace has a right to commit for contempt, it can only be for a contempt committed <i>while in the execution of his office, in his JUDICIAL capacity.</i> <i>FITLER v. PROBASCO.</i>	137
4. In an action for a <i>joint</i> trespass, against two or more, if the jury find the defendants <i>jointly</i> guilty, they cannot assess several damages. <i>SHULTZ v. HUNTER.</i>	233
5. In an action for a <i>joint</i> trespass against three, the jury found a verdict in these words—"we find for the plaintiff five hundred dollars, to be paid by the defendants in the following proportions ; by <i>A.</i> four hundred dollars, by <i>B.</i> fifty dollars, and by <i>C.</i> fifty dollars, say five hundred dollars with costs of suit." The court entered judgment <i>de melioribus damnis.</i> <i>Ibid.</i>	<i>Id.</i>
6. In a <i>joini</i> action of trespass against <i>three</i> defendants, no issue was joined as respected <i>one</i> defendant, the jury found the defendants <i>jointly</i> guilty, but severed the damages, the defendant with whom issue was not joined, filed a paper stating, "that he had no intention of continuing the suit, that he had no wish for a new trial, and that he was ready to pay the costs and damages : " The court refused to arrest the judgment, on the application of the other defendants. <i>Ibid.</i>	<i>Id.</i>

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WILL. : . .	
1. A testator being indebted to one of his children, devised to her fifty pounds, to be paid at the expiration of ten years after his decease, and proceeded thus—"It is my further mind and will that if any of my said children shall, after my decease, make any demand against my executors, for any <i>services</i> they may have done or performed for me, in my life time, then, instead of the bequest mentioned to be given to such child or children, so exhibiting any such demand or charge, I give "the sum of fifteen shillings and no more." In an action against the executor, by a child, for services rendered to the testator, and the statute of limitations pleaded, the court held that the above clauses in the will did not prevent the act of limitations from running. <i>CRES- v. CBSTER.</i>	123
2. A man by his will gave his executors power to sell as much of his remaining lands as should be sufficient to pay his debts.—	

WILL Continued.

Instead of selling, an arrangement was made between the executors and the residuary devisees, by which each devisee was to have his part upon paying his proportion of the debts. The court were of opinion that the debts remained a lien on the premises longer than seven years, notwithstanding the 4th section of the act of the 4th of April, 1797, and that a purchaser under any one of the devisees took it subject to that lien. **MILLEN v. STOUT.** = = = = = -

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L. S. P.

